

University of Helsinki
Faculty of Law

The Ambivalence of Armed Intervention by Invitation:
Caught Between Sovereign and Global Interests

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Doctoral Dissertation

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Abstract

This dissertation concerns armed intervention by invitation in international law. In its essence, intervention by invitation entails the use of force with the consent of the territorial State, which appears simple. However, the modern form of the concept is fraught with legal complexities, including its relationship with the United Nations Charter. The instrument, which should regulate the use of force and make it a collective matter, does not mention unilateral intervention by invitation, leaving its legal basis complicated. Still, this impasse has been bypassed, allowing the concept to exist despite its inherent contradictions.

The thesis examines the position of intervention by invitation in international law governed by the Charter: why the doctrine continues to exist as an international legal concept and how it has fared since 1945. Accordingly, the dissertation has been divided into three research topics: (1) the exact legal basis of intervention by invitation and how it is related to other uses of force, (2) the concept in practice, and (3) its current and future prospects. The thesis deploys the New Haven School approach to international law, thus adopting a policy-oriented perspective.

Upon examination, it is held that the concept is a result of decision-making processes which took place following the adoption of the Charter. These processes were pushed by the most powerful States, which endorsed invited interventions in the absence of collective security. Thus, the concept's emergence is attributed to the failure to implement the scheme of the Charter wholly in the midst of the Cold War, which led to political developments that necessitated the return of invited interventions. Modern intervention by invitation hence exists due to changing circumstances and the State policies adopted in response, not the black letter of law itself. This is mirrored in the practice of the doctrine, which is erratic in many senses, and its current place in international law.

Despite this antagonistic character quality, intervention by invitation has also played a stabilising role during the UN era, as it has quietly served the common values of the global community. This was particularly the case during the Cold War, when the concept — while deepening the polarisation of relations — prevented the political crisis from reaching the point of no return. The doctrine has thus served a dual purpose, attending to both sovereign and common interests. This ambivalence is relevant, because the definitions between unilateral and collective measures, as well as internal and international matters, are becoming hazier. Such developments inevitably have an impact on intervention by invitation and the values it serves.

Of late, intervention by invitation has been invoked to promote global interests more expressly, which suggests that the concept is indeed transforming. However, this transformation may be hindered by the fact that unlike during the Cold War, when it kept the balance of terror in check, intervention by invitation currently has no wider purpose to serve. Finding such a purpose is of utmost importance, should the concept aspire to embody global and sovereign interests in a balanced manner.

Preface

Writing a preface to a doctoral dissertation is difficult for many reasons. For one, it marks the definite end of a project that has dominated one's life for years. Coming to terms with the conclusion of such a phase might instill an identity crisis upon the writer, for imaging life beyond one's PhD project appears impossible. Still, perhaps more prominent has been the issue of stating the obvious: as many dissertations have been completed, equally many prefaces pondering the deeper nature of such studies exist. In other words, it is not easy to come up with new perspectives on the matter, for much has already been said many times over. Thus, in an effort to keep the cliches and sappiness to a minimum, this preface will be short yet sweet.

Despite this resolve, I would like to express my gratitude for the societal and familial environment which has encouraged the pursuit of knowledge. As a country, Finland is known not only for its emphasis on education, but also for teaching the joy of learning. One can only hope that this Finnish strength will not be lost in the future. At a more personal level, I am grateful for being a member of a family that has always appreciated and supported academic endeavours, from primary school to university. Any academic aptitude of mine stems from them, and for that I am eternally thankful.

I would also like to warmly thank my supervisor, Dr. Jarna Petman, for guiding me through this PhD project. This dissertation would not exist without her. I am also indebted to the pre-examiners, Professors Erika de Wet and Tarcisio Gazzini, for their valuable time and comments on the study's contents. Thanks are also due to the professors, teachers, staff, and fellow PhD students at the University of Helsinki who have helped me with the thesis. I am also grateful to the Association of Finnish Lawyers (Lakimiesliitto), Finnish Lawyers' Association (Suomalainen Lakimiesyhdistys) and the Faculty of Law for assisting with the costs of the study. I would also like to thank the University of Helsinki Language Centre for providing swift and precise language revision for the main text and abstract of the dissertation. Finally, I would like to express my gratitude to my family and friends, my mother and my sister in particular, for encouraging me throughout these past four years. No gesture of support has gone unnoticed.

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Chapter I

Introduction — the Objective and Approach of the Study

1. Armed Intervention by Invitation as a Research Topic

1.1. The Polarised Intervention by Invitation and the Balance Hidden Within

By its very name, the concept of armed intervention by invitation — using force at the behest of the territorial State — entails an inherent oxymoron. The term simultaneously suggests coercion and consent, bringing forth a conundrum which quickly engulfs the concept's supposedly simplistic appearance. The oxymoronic flair is manifested throughout the concept, from its precise legal justification to the objectives it seeks to serve in practice. Such an outcome has occurred since accommodating sovereign interests and collective objectives, the two notions that intervention by invitation constantly juggles, has proven difficult. In fact, the latter is in constant fear of being absorbed by the former, which has led to invited interventions appearing to be rather contradictory.

To illustrate this dilemma, we should return to March 2014, when the world was captivated by the developments on the Ukrainian peninsula of Crimea. Following the revolution which resulted in the ousting of President Viktor Yanukovych, the area had been marked by the appearance of Russian military troops.¹ The intervenor, Russia, argued that its military presence was justified by an invitation supplied by the ousted President Yanukovych, who had requested armed assistance to restore order to the peninsula.² In other words, the State invoked intervention by invitation as a legal argument, and claimed that its armed activities were necessary to recover the internal stability of Ukraine.³ However, Russia noted that it had also been invited by the then newly-appointed autonomous government of Crimea, which added a possible complication to this apparent simplicity.⁴

This complication went into full bloom when the peninsula, mostly inhabited by Russian-speaking people, sought to break free from Ukraine.⁵ Such goals were set with

¹ Olivier Corten, 'The Russian Intervention in the Ukrainian Crisis: Was *Jus Contra Bellum* "Confirmed Rather than Weakened"?' (2015) 2 *Journal on the Use of Force and International Law* 17, p. 18; James A. Green, 'Editorial Comment – The Annexation of Crimea: Russia, Passportation and the Protection of Nationals Revisited' (2014) 1 *Journal on the Use of Force and International Law* 3, p. 5.

² Record of the Security Council's 7125th Meeting, 3 March 2014, UN Doc. S/PV.7125, pp. 3-4.

³ Ibid.

⁴ Ibid., p. 3; Green, 'Editorial Comment', pp. 6-7.

⁵ Record of the Security Council's 7134th Meeting, 13 March 2014, UN Doc. S/PV.7134, p. 2.

the hopes of joining Russia instead.⁶ This venture directly contradicted the previous Russian claim that it was in Crimea to restore order, especially after the State began to support the secessionist aspirations directly.⁷ Ultimately, Russia chose to discard the invitation previously given by former President Yanukovych, instead stressing cooperation with the autonomous government of Crimea.⁸ However, this combination of the secession attempt and invited intervention was met with predominantly negative opinions from the international community.⁹ This was the response even though the venture was argued to be based upon the self-determination of peoples,¹⁰ which is a commonly valued *erga omnes* norm of international law.¹¹ Hence, the Russian attempt to invoke intervention by invitation to further the supposed self-determination of Crimea's people was rejected, as most observers felt that the State was rather exploiting the concept for its own geopolitical interests.¹²

The modern example of Crimea showcases the oxymoronic nature of intervention by invitation as a form of armed force. On the one hand, it is a doctrine predominantly exhausted by States to further their sovereign interests, hence bearing a rather antagonistic image. On the other, throughout its existence, intervention by invitation has also served various common normative values of the global community, albeit in the background. Hence, while the concept is perhaps best known for adhering to unilateral aspirations, intervention by invitation is not ignorant of the international community's values, either. It is committed to these interests as well, and thus attempts, although not always successfully, to attend to both unilateral and collective objectives. The ultimate goal of the concept is thus to strike a balance between these two interests, so that one does not utterly overshadow the other.

In the Crimean case, the Russian attempt to bring these two sides together resulted in a contradiction in terms so severe that it challenged sheer logic.¹³ This is because the State

⁶ Corten, 'Russian Intervention', p. 18.

⁷ Record of the Security Council's 7134th Meeting, pp. 15-16.

⁸ Record of the Security Council's 7144th Meeting, 19 March 2014, UN Doc. S/PV.7144, pp. 8-10; Corten, 'Russian Intervention', pp. 31-32 and 39.

⁹ *Territorial Integrity of Ukraine*, GA Res. 68/262, 27 March 2014, UN Doc. A/RES/68/262, paras. 1-6; Record of the Security Council's 7125th Meeting, pp. 4-8 and 10-13; Record of the Security Council's 7144th Meeting, pp. 2-3, 7, 10, 13 and 15-18.

¹⁰ Record of the Security Council's 7134th Meeting, pp. 15-16; Record of the Security Council's 7144th Meeting, p. 8.

¹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, para. 88.

¹² *Territorial Integrity of Ukraine*, paras. 1-6.

¹³ For a more detailed argument on the matter, see Heini Tuura, 'Intervention by Invitation and the Principle of Self-Determination in the Crimean Crisis' (2013-2014) 24 *Finnish Yearbook of International Law* 183, pp. 223-224.

failed to establish equal footing for the different interests supposedly encompassed in the invited intervention.¹⁴ For instance, its claim on the self-determination of Crimea's people, a norm generally championed by the international community, directly contradicted the equally common interest of not allowing territorial acquisitions resulting from the use of force.¹⁵ Consequently, the scales tipped towards the unilateral objectives of Russia, leaving any common values up in the air. As a result, the intervention and its aftermath have not been recognised as legitimate by the international community.¹⁶

The outcome of the Russian venture, while highlighting the issues of invited interventions, does not mean that all such attempts are destined to be doomed, at least not from the outset. After all, the dual part of the concept has persisted throughout history, and the attempted collaboration between these roles has not always ended in conflict. In fact, the concept managed to strike a balance between sovereign interests and common goals back in the 1800s, when it first became a distinguishable legal notion. Some of the earlier appearances of intervention by invitation are attributed to the alliances that were formed in Europe following the regime of Napoleon Bonaparte, the turbulences of which were still fresh in minds across the continent.¹⁷ For this reason, these alliances sought to preserve inter-State peace by upholding the internal stability of the contracting parties, with military interventions if such measures were deemed necessary.¹⁸

As the decades turned, these military alliances crumbled, but the practice of invited interventions persisted.¹⁹ However, certain new legal developments began to cause the doctrine's position to waver. Namely, these changes consisted of the growing reluctance to intervene in incidents of internal unrest of others, let alone non-international armed conflicts, as well as the budding attempts to rein in inter-State use of force altogether.²⁰

¹⁴ Record of the Security Council's 7125th Meeting, pp. 4-8 and 10-13; Record of the Security Council's 7144th Meeting, pp. 2-3, 7, 10, 13 and 15-18.

¹⁵ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res. 2625, 24 October 1970, UN Doc. A/RES/2625(XXV), Principles I and V.

¹⁶ *Territorial Integrity of Ukraine*, paras. 1-6.

¹⁷ Georg Nolte, 'Intervention by Invitation — Oxford Public International Law', *The Max Planck Encyclopedia of Public International Law*, January 2010, <opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?prd=EPIL>, para. 2; Antonio Cassese, *International Law* (Second Edition, New York, Oxford University Press Inc., 2005), pp. 28-29; Ian Brownlie, *International Law and the Use of Force by States* (London, Oxford University Press, 1963), p. 19.

¹⁸ Cassese, *International Law*, pp. 28-29; Brownlie, *International Law and the Use of Force*, p. 19; Martti Koskeniemi, *The Politics of International Law* (Oxford, Hart Publishing, 2011), p. 37.

¹⁹ Nolte, 'Intervention by Invitation', *The Max Planck Encyclopedia*, January 2010, para. 2.

²⁰ Gregory Fox, 'Intervention by Invitation' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford, Oxford University Press, 2015), pp. 816-819.

These developments reached their apex following the end of the Second World War, when the international community agreed on restricting the use of force by States, instead bestowing the right to such measures to the new-born United Nations (UN).²¹ The status of intervention by invitation, especially considering its part in the early stages of the War in 1939,²² was left astray in the midst of this, which led to the distortion of the concept. What is further, the first decades of the life of the UN were marked with the duty to not intervene in the civil wars of other States.²³ Thus, the Charter originally appeared to denounce the previously championed idea of linking the internal stability of sovereign nations to inter-State peace. Given how invited interventions were traditionally used to sustain this connection, the concept was thrust into an even deeper state of confusion, one wherein its survival did not seem apparent.

However, this did not turn out to be the case. Despite the attempt at the contrary, the centralisation of the use of force to the UN famously failed during the first steps of the organisation. This led to the re-emergence of intervention by invitation, which was now forced to reinvent itself to accommodate the new individual and collective interests of the global community. Moreover, this task subsequently became even more problematic for two reasons. Firstly, the commonly agreed upon initial objective of firm non-use of force was no longer such, for other aspirations had caused it to retreat.²⁴ Secondly, despite this failure to implement wholly the plan of the Charter, it was not discarded altogether.²⁵ Rather, it has continued to stay in effect, and States determinedly rely on the document in argumentation, even if practice does not strictly follow suit.²⁶

The combined effect of these two facts pushed the regulation on armed force into limbo, subsequently causing the exact position of invited interventions to become indeterminate as well. This inevitably caused further problems for the balance within intervention by invitation, as it was already reconfiguring itself in the context of the Charter. As is well known, under the document's regulation '(a)ll Members shall refrain in their international relations from the threat or use of force against the territorial

²¹ UN Charter, Preamble and Article 1(1).

²² Brownlie, *International Law and the Use of Force*, p. 317.

²³ *Draft Declaration on Rights and Duties of States*, GA Res. 375, 6 December 1949, UN Doc. A/RES/375(IV), Article 4; *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res. 2131, 21 December 1965, UN Doc. A/RES/2131(XX), para. 2; *Friendly Relations*, Principle III; Franck, *Recourse to Force*, pp. 40-41.

²⁴ Franck, *Recourse to Force*, pp. 3-4.

²⁵ *Ibid.*, pp. 3-7.

²⁶ *Case Concerning Military and Paramilitary Activities In And Against Nicaragua* (Nicaragua v. the United States of America), Merits, ICJ Reports 1986, 14, para. 186; Christine Gray, *International Law and the Use of Force* (Third Edition, New York, Oxford University Press Inc., 2008), p. 25.

integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations', unless an exception to this rule permits armed activities.²⁷ Furthermore, it is equally well known that this instrument makes no reference to intervention by invitation, which in the eyes of a formalist lawyer leads to a default assumption about the doctrine's unlawfulness.²⁸ In other words, it appears that intervention by invitation does not accommodate the norms established by the Charter,²⁹ let alone its core objectives of centralising the use of force.³⁰ At the same time, even a quick glance at the practice of States since 1945 suggests that they consider the concept to be perfectly applicable, creating a clear contradiction between the black letter of law and the actions of sovereign States.³¹

Here, we encounter another example of the rather paradoxical essence of intervention by invitation. For one, it is undeniable that the concept is admissible when requested by the territorial State's government. This much was famously confirmed by the International Court of Justice (ICJ) in *Nicaragua*, although almost in passing: '(I)t is difficult to see what would be left of the principle of non-intervention in international law if intervention, *which is already allowable at the request of the government of a State*, were also to be allowed at the request of the opposition (emphasis added).'³² Yet, despite this brief yet often cited affirmation,³³ the doctrine remains vaguely characterised as far as specific justifications go, while practice on the matter is simultaneously reverent and uneven.³⁴ Hence, it could be stated that intervention by invitation is a manifestation of the identity crisis that the regulation on armed force has been undergoing since 1945. While it is apparent that the initial objective of the Charter will not be achieved, no clear, all-encompassing alternative to the scheme has been suggested, either. Rather, the international community has relied on specific forms of relief, band aids even, to sustain the damage caused by the non-implementation of the Charter.

Since intervention by invitation is but one of these forms of relief, its position is that of an outlier form of armed force rather than a defined part of a functioning system. Still,

²⁷ UN Charter, Article 2(4).

²⁸ Cassese, *International Law*, p. 369.

²⁹ *Ibid.*, pp. 369-370.

³⁰ UN Charter, Preamble and Articles 1(1), 2(4) and 24.

³¹ Cassese, *International Law*, p. 370.

³² *Nicaragua*, para. 246.

³³ The ICJ itself upheld the finding when it accepted consensual use of force in *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Merits, ICJ Reports 2005, 168, para. 45.

³⁴ Erika de Wet, 'The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force' (2015) 26 *European Journal of International Law* 979, p. 980; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 860; Gray, *International Law and the Use of Force*, pp. 80-81.

despite this rather fractured position, intervention by invitation has managed to hold on amongst changing circumstances. The most notable of these changes has been the eventual cessation of the Cold War, which brought about an attempt to install collective security to its originally envisioned position.³⁵ Although this venture has not been fully successful in installing the normative framework spelled out in the Charter, it has managed to make collective use of force a possible option.³⁶ Moreover, collective security began to be deployed in internal conflicts rather than international ones, which not only marks a notable evolution of the Charter's contents,³⁷ but also once again brought the doctrine into the same field as invited interventions.³⁸ While this development was undeniably modern, it is also laced with an undeniable throwback to the 1800s and its military alliances, which were established with the purpose of maintaining peace by safeguarding internal stability.³⁹

When this historical background is put together, we are ultimately left with a contradiction in terms, and on many levels of law for that matter. On the superficial level, it can be observed that intervention by invitation is a concept that has been applied for centuries, but it is yet to gain a clearly-defined legal basis.⁴⁰ More thematically, however, one can also note that the doctrine has borne two, sometimes conflicting, purposes: the sovereign interests of the select few and the common values of the community on the larger scale. Ever since the adoption of the UN Charter, these themes have appeared to clash, having been unable to find a proper balance. This has turned modern intervention by invitation into an enigma of sorts, one which needs to be decoded.

1.2. The Main Objective and Research Questions of the Study

All in all, it could very well be stated that intervention by invitation is one of the most contradictory practices of international law. On one hand, it is a recognised legal doctrine which has been put into practice in constant rotation.⁴¹ On the other, both its practical limits and legal core remain unrefined, as they continue to evade precise description.⁴² Moreover, in many respects this often self-cannibalising concept suffers from a lack of constructiveness, an issue which is enhanced by the willingness of States to execute

³⁵ Gray, *International Law and the Use of Force*, pp. 110 and 254.

³⁶ *Ibid.*, pp. 254-255.

³⁷ Franck, *Recourse to Force*, pp. 40-41.

³⁸ Gray, *International Law and the Use of Force*, p. 113.

³⁹ Brownlie, *International Law and the Use of Force*, p. 19.

⁴⁰ Nolte, 'Intervention by Invitation', *The Max Planck Encyclopedia*, January 2010, para. 2.

⁴¹ *Nicaragua*, para. 246; *Mali*, SC Res. 2100, Preamble; *Definition of Aggression*, Article 3(e); Crawford, *Brownlie's Principles*, pp. 769-770.

⁴² de Wet, 'Modern Practice of Intervention by Invitation', pp. 980-981.

invited interventions much too leisurely, without sufficiently defined requirements. In fact, as noted by Professor Christine Gray, this lack of thorough explanation on the doctrine, in particular by the ICJ in *Nicaragua*, ‘(...) masks the complexity that may arise in the interpretation and application of this rule. The basic principle of the right of a government to invite a third State to use force and the absence of any such right for an opposition may be accepted in theory, but its application in practice has not been simple.’⁴³

For these reasons, intervention by invitation stands as an oddity of its own, as it remains rather disembodied. This fragmentation has been reflected on prior academic research on the matter. For instance, intervention by invitation is frequently featured on compilation works and other studies on the use of force, but often only as a part of an ensemble cast.⁴⁴ In other words, coherent and all-encompassing studies on the matter are difficult to find, which is unfortunate given how important and frequently-used the doctrine is. The at times unpredictable State practice, which has continued for decades, has done nothing to resolve the issue. In fact, such activities may have made matters worse, as commentators have been forced to examine intervention by invitation on a constant case-by-case basis, an approach which leaves little room for thorough studies.

All factors considered, the concept is difficult for an international lawyer to put together. Metaphorically speaking, contemporary intervention by invitation is reminiscent of an unsolved jigsaw puzzle with mismatching pieces: no matter how hard one tries, the pieces do not seem to form a coherent picture. If anything, some parts required to fulfil the task appear to be missing, whereas the available pieces belong to other puzzles. The result can only be described as a perpetual conundrum.

This inherently conflicting two-fold nature of intervention by invitation is the main research problem that my study will address. Working towards the solution, the purpose of my dissertation is to form a cohesive study on intervention by invitation, which fills the various gaps about its legal basis and application in both present and future. To this end, the study focuses on the formation of modern intervention by invitation, seek to find out why and how it emerged and evolved within the UN’s normative perimeter. Hence, the specific research questions are divided into three main sections: intervention by

⁴³ Gray, *International Law and the Use of Force*, pp. 80-81.

⁴⁴ See for instance Gray, *International Law and the Use of Force*, pp. 67-113; Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford, Oxford University Press, 2015), pp. 816-840; Tanca, *Foreign Armed Intervention*, pp. 13-50; Lori Fisler Damrosch and David J. Scheffer (eds), *Law and Force in the New International Order* (Boulder, Westview Press, 1991), pp. 113-142; Antonio Cassese (ed), *The Current Regulation of the Use of Force* (Dordrecht, Martinus Nijhoff Publishers, 1986), pp. 147-166; Eliav Lieblich, *Intervention in Civil Wars: Intervention and Consent* (Columbia University, 2012).

invitation as a legal concept (1), the concept's application in practice (2) and its current and possible future prospects (3).

I should expand these three research questions further. Firstly, the dissertation will discuss the exact legal justification of intervention by invitation and the reason for its conceptual indeterminacy. This means studying how intervention by invitation gained its current position since 1945, and how it has managed to accommodate the Charter's legal requirements. Hence, the research question will examine the responses to the lawfulness of intervention by invitation and its conceptual relation to other forms of armed force, both in and outside the context of the Charter. Secondly, following the conceptualisation of intervention by invitation, the thesis will also shed light on the various practical problems caused by the doctrine, for example the issues concerning the invitation itself and the concept's application under different circumstances. The second research question hence focuses on how invited interventions pan out in practice and what clear conditions, if any, they should follow.

Thirdly and finally, the three-point focus will end in providing analysis on the current dilemmas and possible upcoming issues of the doctrine. These matters include the doctrine's application in the fight against terrorism, alongside collective security and during different, formerly non-international armed conflicts, including those of secessionist nature. Therefore, the third research question builds on the context established by the preceding research issues, bringing the enigma that is intervention by invitation to the stage of current world events. Moreover, the final question will be closed with remarks on the possibility of State responsibility for the intervention.

Ultimately, this triad of points will confirm the major statement of this thesis: that intervention by invitation, despite undeniably doing the sovereign bidding of intervening States, has also been fundamental in maintaining international stability through the centuries. Consequently, the task of intervention by invitation has been to uphold peaceful inter-State relations using invited armed interventions into other sovereign States, as paradoxical as that statement may sound. Thus, the concept portrays a dual role in international law, attending to both individual and common interests, while hoping to strike a manageable balance between the two. During the early UN era, this balance tipped in favour of sovereign interests, making intervention by invitation a necessary evil rather than a celebrated champion of justice.

Nevertheless, this connection between the dual purposes of invited interventions was manifested more wholesomely in the 1800s, in the form of that era's military alliances, short-lived as they may have been. Since then, however, the dual objective of intervention by invitation has been distorted due to changing circumstances, the first of which was the growing hesitance to intervene in civil wars, a development which eventually culminated

in an express ban to engage in such activities.⁴⁵ The second circumstance is that of the evolving regulation on the use of force by States. This development ultimately led to intervention by invitation being banned under the ambitious plan of the Charter, which was meant to serve the role previously held by consensual use of force.⁴⁶ In other words, excluding the exception of self-defence, unilateral uses of force were meant to be made redundant with adoption of the Charter.⁴⁷

However, as this scheme never came to full fruition, intervention by invitation could re-emerge through the policies of the time's superpowers, in an effort to sustain the faltering of the Charter. Given that this new incarnation of intervention by invitation was forced to operate within the political atmosphere of the Cold War, the doctrine had to bring the sovereign interests of the bickering superpowers to the forefront.⁴⁸ However, this did not denote that the common values were discarded altogether. Rather, they were pushed to the back-burner, from which they managed to subtly influence invited interventions. Hence, even though the practice bore an antagonistic image, it was still necessary to advance common, yet well-disguised objectives.

What is further, the end of this polarisation of relations allowed the global interests to return to the limelight, which has led to invited interventions being invoked in a purpose-oriented manner that caters to common values. Examples of such purpose-oriented application include the use of consensual use of force to combat international terrorism, or to assist the implementation of collective security.⁴⁹ This could mean that intervention by invitation is currently returning to the themes based in the 1800s, when upholding internal stability of individual sovereign nations was the publicly acknowledged — and even embraced — key to inter-State peace. However, this latest development is still very much in progress, and thus it remains to be seen if the unilateral and collective interests have truly managed to find a more sustainable connection.

Having now established the main research objective, questions and statement of the dissertation, a mention should be made about the limitations and possible omissions of the study. Namely, the focal point of this research is set in the UN era of the use of force, meaning that the main analysis focuses on events which have taken place since 1945.

⁴⁵ Fox, 'Intervention by Invitation', pp. 816-817; Franck, *Recourse to Force*, pp. 40-41; *Friendly Relations Declaration*, Principle III; *Rights and Duties*, Article 4; *Inadmissibility of Intervention*, para. 2.

⁴⁶ UN Charter, Preamble and Article 1(1).

⁴⁷ Ibid., Preamble and Articles 1(1), 2(4) and 51; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Oxford University Press, 1994), p. 238.

⁴⁸ Gray, *International Law and the Use of Force*, p. 84; Rein Mullerson, 'Intervention by Invitation' in Lori Fisler Damrosch and David J. Scheffer (eds), *Law and Force in the New International Order* (Boulder, Westview Press, 1991), pp. 127-30.

⁴⁹ Karine Bannelier-Christakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent' (2016) 29 *Leiden Journal of International Law* 743, p. 747.

While the historical developments are not discarded in this dissertation, they are only examined to the extent they assist the main objective of the study. In other words, developments on intervention by invitation pre-1945 only have supporting roles in the analysis. Moreover, since intervention by invitation presupposes sovereignty, this dissertation will focus on the actions of States, while non-State actors will be examined more limitedly.

2. The Methodological Aspects

2.1. Preliminary Considerations

Setting out the research questions and limits of the dissertation alone is not enough, as they need to be analysed through a proper legal method in order to form a truly academic piece of research.⁵⁰ Hence, before moving on to the analysis itself, I will discuss the methodological approach that has been applied in the thesis. And indeed, examining any topic rooted in international law requires specific methodological equipment, which comes with a variety of options over specific theoretical approaches. However, whichever one believes to be the correct method to examine international law, all these approaches have relented and accepted a particular observation.

This observation concerns a concession, one which is present in all legal disciplines: law, despite its best efforts to regulate any society concisely, is inherently indeterminate at heart.⁵¹ This is because no norm can ever be drafted with perfect knowledge on how it will actually be enacted in practice.⁵² As a result, no legal norm in itself can be complete, as all the possible circumstances it is applied to remain unforeseeable.⁵³ Hence, law needs to seek additional evaluation for its interpretation.⁵⁴ Nevertheless, these issues of interpretation can usually be managed in national contexts, which ideally contain a defined legal system with pertinent institutions. These authorities can be referred to when the contents of law are in dispute, thus offering the predictability of rational decisions to the application of norms.⁵⁵

However, the indeterminacy of law is enhanced in international law, which is of a special nature. Several reasons can be attributed to this premise, perhaps most notably the lack of impartial central authorities that can clarify the content and applicability of international legal norms.⁵⁶ Rather, the international community must continuously rely on the vastly varied individual policies and values of various sovereign States.⁵⁷ What is further, enacting these policies can turn into a struggle, on in which the more powerful

⁵⁰ David Kleimann, 'Positivism, the New Haven School, and the Use of Force in International Law' (2006) 3 *Brussels Journal of International Studies* 27, p. 27.

⁵¹ Joseph William Singer, 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 *Yale Law Journal* 1, pp. 11-13.

⁵² *Ibid.*, p. 12; Koskeniemi, *Politics of International Law*, pp. 206-207.

⁵³ Koskeniemi, *Politics of International Law*, pp. 206-207.

⁵⁴ Singer, 'Player and the Cards', pp. 12-13; Higgins, *Problems and Process*, p. 9.

⁵⁵ Singer, 'Player and the Cards', pp. 12-13 and 19-20.

⁵⁶ Higgins, *Problems and Process*, pp. 5-7 and 10.

⁵⁷ *Ibid.*, pp. 5-7.

tend to rule over others.⁵⁸ In any event, this setting inevitably waters down the definitions of international legal norms, and thus leaves them open to various interpretations.⁵⁹

Accordingly, all lawyers working in the field of international law must be equipped with a certain sense of realism. While the discipline aspires to be a legal framework built upon supranational values and goals, its functioning is often hampered by particular sovereign interests.⁶⁰ As a consequence, the international community as a whole depends on an uneven vision of sorts, one which may become shattered at any second.⁶¹ Thus, despite having its earnest intentions of regulating this community, international law is yet to shake off the stigma of indeterminacy, consequently leaving its interpretation perpetually subjective.⁶²

However, this does not denote that all effort on the discipline should be discarded altogether. Conversely, the indeterminacy bestows certain responsibilities upon the international community — and by extension the lawyers who examine it in an attempt to categorise and illuminate its contents.⁶³ These responsibilities entail the establishment of a balance, one which keeps the indeterminacy of international law in check, by identifying normative values that allow actors in this field to make choices between different types of interpretation.⁶⁴ This can *inter alia* be achieved by not exploring the letter of the law alone, but by also considering the circumstances wherein it is applied and the various components that influence it.⁶⁵ Placing law in a distinguishable context should hence be regarded as a strength, as it not only enables the possibility to make rational choices, but also results in those choices contributing towards an ever-continuing process.⁶⁶

In the field of armed force specifically, the flexibility of international law has not only been recognised but to a certain extent even embraced. In fact, many studies on armed force tend to stress the importance of the Charter as a dynamic rather than static

⁵⁸ Shirley V. Scott, *International Law in World Politics: an Introduction* (London, Lynne Rienner Publishers, Inc, 2010), p. 14.

⁵⁹ Emmanuelle Jouannet, 'Koskenniemi: A Critical Introduction' in Martti Koskenniemi, *The Politics of International Law* (Oxford, Hart Publishing, 2011), p. 9.

⁶⁰ Charles De Visscher, *Theory and Reality in Public International Law*, translated from French by P. E. Corbett (Princeton, Princeton University Press, 1968), pp. 89-91; Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, revised by Kenneth W. Thompson and W. David Clinton (Seventh Edition, New York, McGraw-Hill Higher Education, 2006), pp. 7-8.

⁶¹ De Visscher, *Theory and Reality in Public International Law*, p. 91.

⁶² Koskenniemi, *Politics of International Law*, p. 298.

⁶³ Higgins, *Problems and Process*, p. 9.

⁶⁴ *Ibid.*, pp. 9-10.

⁶⁵ *Ibid.*, p. 9. Of course, this suggested relief is the very aspect that international law is often criticised for, see Koskenniemi, *Politics of International Law*, p. 62.

⁶⁶ Higgins, *Problems and Process*, pp. 9-10.

instrument, stating that the document, despite being the cornerstone of international law, is subject to constant process arising from new interpretations.⁶⁷ Hence, the Charter does not remain stationary, as it is constantly evolving in accordance with the context within which it applied.⁶⁸ It has been interpreted that this view is shared by the ICJ as well, for the Court has noted that when evaluating the Charter's contents, one needs to take the customary international law on the use of force into consideration as well.⁶⁹ As further confirmation, the Court has highlighted similar contextual interpretation in the past, thus acknowledging that various elements need to be examined in legal argumentation.⁷⁰

Thus, focusing on context may be the unavoidable remedy for the indeterminacy of international law, even if such an approach may flirt with the risk of creating further haziness. No matter how one spins it, it is evident that the regulation on the use of force is not conclusively encoded in the Charter alone, bringing additional sources, such as customary international law, into play.⁷¹ What is further, the ICJ has also noted that when assessing the components of international custom — State practice and *opinio iuris* — the individual agendas and goals of sovereign States need to be addressed as well.⁷² In other words, the actions and statements of States alone do not necessarily always contribute towards the formation of new customary international law.⁷³ Hence, they too need to be set against a context first, which will reveal if they are worthy evidence of new legal developments.

Consequently, the regulation on the use of force, with regard to both its goals and specific provisions, is not of pure black letter law, wherein all that is necessary for successful legal argumentation is conclusively found in the letter of the law itself.⁷⁴ On the contrary, these legal notions depend on circumstances particular to each situation, as well as the agendas and values of specific States.⁷⁵ However, in accordance with the general observation on the indeterminacy of international law,⁷⁶ this finding is not necessarily a detriment, as it can result in sustainable developments concerning the use of force as well. Given that the UN Charter's vision for the use of force is not working

⁶⁷ Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester, Manchester University Press, 2005), pp. 1-2; Franck, *Recourse to Force*, pp. 6-7.

⁶⁸ Gazzini, *Changing Rules*, pp. 1-2; Franck, *Recourse to Force*, pp. 6-7.

⁶⁹ Gray, *International Law and the Use of Force*, p. 8; *Nicaragua*, para. 176.

⁷⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, para. 53.

⁷¹ *Nicaragua*, para. 176.

⁷² *Ibid.*, paras. 206-207.

⁷³ *Ibid.*

⁷⁴ Franck, *Recourse to Force*, pp. 6-7.

⁷⁵ *Legal Consequences*, para. 53; *Nicaragua*, paras. 206-207.

⁷⁶ Higgins, *Problems and Process*, p. 9.

out as planned — a fact well-exemplified by the mere existence of intervention by invitation — such flexibility may be vital.

2.2. Which Legal Method Prevails Against the Theoretical Outset?

2.2.1. Dodging the Stalemates of Traditional Theoretical Approaches

Having set out the general requirements for the theoretical approach, the focus will now turn to the available methods. This selection of a specific method should begin with short acknowledgements on positivism and natural law, the prominent approaches in the field of international law. On their own both are unlikely to yield pertinent results on intervention by invitation, albeit for different reasons. In its essence, legal positivism is grounded upon following the treaties and customary international law that States have proactively consented to, ultimately promoting a unified and systemised batch of legal norms.⁷⁷ However, this approach, while it does emphasise certain components of intervention by invitation by focusing on sovereign activities, still proves inadequate. This is because it does not concentrate on the other side of the coin, supranational values, a notion more thoroughly attended to by natural law.

Natural law may also prove insufficient for the purposes of this thesis. In its classic form, this approach sees law as being inherently derived from a certain set of values and institutions instead of being clearly created by man to regulate any given society.⁷⁸ At first sight, this would seem to suggest compatibility with the present study. However, the normative framework of the UN Charter, specifically designed to limit the abilities of States,⁷⁹ may contradict the approach too severely. Despite this conclusion, both positivism and natural law include elements which ought to be included in or at least addressed by the method of choice: emphasis on sovereign interests and supranational values, respectively.

Consequently, we need to discover a legal method that entails certain echoes of both positivism and natural law, while engaging in contextual interpretation. With this being the case, it appears that the dissertation must adopt an approach from the legal field which more heavily draws from and relates to sociology.⁸⁰ Choosing to do so offers many

⁷⁷ Anne-Marie Slaughter and Steven R. Ratner, 'The Method Is the Message' (1999) 93 *The American Journal of International Law* 410, p. 411; Robert Cryer, Tamara Hervey and Bal Sokhi-Bulley with Alexandra Bohm, *Research Methodologies in EU and International Law* (Oxford, Hart Publishing, 2011), p. 38.

⁷⁸ Alan Hunt, 'The Problematisation of Law in Classical Social Theory', in Reza Banker and Max Travers (eds), *Law and Social Theory* (Second Edition, Hart Publishing, 2013), p. 19.

⁷⁹ UN Charter, Preamble and Article 1(1).

⁸⁰ Higgins, *Problems and Process*, p. 9.

alternatives, from classical takes to critical ones.⁸¹ Overall, however, this general method on law contends itself in using social theories to *inter alia* examine different legal aspects, such as behaviour and institutions, thus focusing on how law behaves in action.⁸² The core objective of all of this is to evaluate legal phenomena in their respective, vastly varying settings.⁸³ It is a foundation that can be applied in the international community as well, since such sociological approaches can already be linked to the start of the 20th century, with many branching schools of thought having emerged since then.⁸⁴ However, while such approaches can be deployed to study international law in general, are any of these schools of thought well-suited to the needs of this particular thesis?

As far as general requirements for the method go, it appears that we need a sociological legal approach that offers a way out of the impasses of prevalent legal traditions. Such an approach is vital because intervention by invitation in its modern form is an incomplete picture, since the current sources of international law do not offer a concise explanation for its legal basis.⁸⁵ This means that one needs to dive much deeper into how the international community functions in order to draw out the doctrine's true basis. In other words, what remains to be found then is a sociological legal approach that also satisfies the requirement of reflective and assertive interpretation of international legal argumentation. Without such a take, the examination of argumentation can easily end in contradictions and stalemates, as States often tend to discard the supranational goals of international law for their own ends, at least on the surface.⁸⁶

In addition, the use of force being the subject of this thesis sets certain more-specific demands. These requirements were touched upon earlier in this section: the deployed method must understand the dynamic nature of the use of force, as well as how it is prone to reflect the continuous changes in the policies of States.⁸⁷ Fortunately, a sociologically-based legal method could satisfy such conditions, since they usually aim to consider the

⁸¹ Reza Banakar and Max Travers 'Introduction' in Reza Banakar and Max Travers (eds), *Law and Social Theory* (Second Edition, Oxford, Hart Publishing, 2013), pp. 1-8; Reza Banakar and Max Travers, 'Critical Approaches' in Reza Banakar and Max Travers (eds), *Law and Social Theory* (Second Edition, Oxford, Hart Publishing, 2013).

⁸² Banakar and Travers, 'Introduction', p. 2; Cryer, Hervey, Sokhi-Bulley and Bohm, *Research Methodologies*, p. 86.

⁸³ Banakar and Travers, 'Introduction', p. 2.

⁸⁴ Jost Delbrück, 'Max Huber's Sociological Approach to International Law Revisited' (2007) 18 *European Journal Of International Law* 97, pp. 97-98; Cryer, Hervey, Sokhi-Bulley and Bohm, *Research Methodologies*, pp. 86-88.

⁸⁵ Byrne, 'Consent and the Use of Force', p. 98; de Wet, 'Modern Practice of Intervention by Invitation', p. 980.

⁸⁶ Schachter, *International Law in Theory and Practice*, pp. 2-3; De Visscher, *Theory and Reality in Public International Law*, pp. 90-91 and 100-101.

⁸⁷ Gazzini, *Changing Rules*, pp. 1-2.

various circumstances and factors which affect legal norms.⁸⁸ This finding further stresses the compatibility of such methods with discussing the legal reasoning and practice of armed intervention by invitation. Consequently, with all these ingredients considered, making an excursion to the field of sociologically-based legal approaches is indeed fundamental in finding a proper method. Only by doing so can one find a method which accepts the flexible nature of the use of force, and by extension, intervention by invitation.

2.2.2. The New Haven School as the Solution

In the context of sociologically-based legal methods, the requirements detailed above essentially lead us to the New Haven School of International Law, first founded as a critical school of thought in the Yale Law School during the mid-1940s.⁸⁹ The school of thought has been championed as the critical counter-argument to the Cold War realism that engulfed the globe for decades, while also serving as an opposing force to strict positivism.⁹⁰ And indeed, with what is often labelled the policy-oriented approach, the New Haven School asserts international law to comprise non-stop decision-making processes which transcend the definitions of national and international.⁹¹ Accordingly, the key words here are process and decision-making.⁹²

These decision-making processes, mainly involving States and other important actors, are ‘both authoritative and controlling’, yet conscious in the sense that they place normative evolutions in their respective contexts, which are created by a variety of factors.⁹³ To state it differently, the method does not deem international law to be merely a strict, clearly defined and neatly categorised set of norms.⁹⁴ Consequently, international law is not a body of rules laid in stone, existing without an express purpose or goals.⁹⁵ Rather, it is a notion which evolves constantly, and at times at the behest of the very subjects it attempts to bind. However, at its heart remains the target of serving the mutually-held values and goals of the society it governs — in other words, the

⁸⁸ Higgins, Problems, and Process, pp. 9-10.

⁸⁹ Steven R. Ratner and Anne-Marie Slaughter, ‘Appraising the Methods of International Law: a Prospectus for Readers’ (1999) 93 *American Journal of International Law* 291, p. 293.

⁹⁰ Janet Koven Levit, ‘Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law’ (2007) 32 *The Yale Journal of International Law* 393, p. 394.

⁹¹ Ratner and Slaughter, ‘Appraising the Methods of International Law’, pp. 293-294.

⁹² Ibid., p. 294; W. Michael Reisman ‘The View from the New Haven School of International Law’ (1992) 86 *American Society of International Legal Proceedings* 118, p. 120.

⁹³ W. Michael Reisman, Siegfried Wiessner and Andrew R. Willard, ‘The New Haven School: A Brief Introduction’ (2007) 32 *Yale Journal of International Law* 575, p. 576.

⁹⁴ Reisman ‘View from the New Haven School’, pp. 119-120.

⁹⁵ Molly Land, ‘Reflections on the New Haven School’ (2013-2014) 58 *New York Law School Law Review* 919, p. 920.

international community.⁹⁶ These values also serve as the means for reigning in the sovereign actions of States, thus bringing forth a balance, at least a tentative one, between the two notions.

Still, concisely discerning such global values, while vital for the objectives of this thesis, can be a difficult task, especially from a legal standpoint. However, through the use of logic, it can be deduced that these common values must be embodied in norms chosen by the members of the global community as being the most important.⁹⁷ The common interests must then be the norms in which all States have interests, and which have been selected as primary in international law.⁹⁸ Assistance can thus be sought from the notions of *ius cogens* and *erga omnes*, which stand for peremptory norms and rules owed towards all States, respectively.⁹⁹ The *ius cogens* rules elevate certain norms of international law above others, such as the prohibitions on aggression and genocide, making them primary in nature.¹⁰⁰ Thus, in the event of conflict, these rules enjoy normative supremacy.¹⁰¹ Moreover, obligations *erga omnes* always concern all sovereign States, regardless of the particular situation: this means that all States may make claims over any purported violation of these norms, essentially making them communal matters.¹⁰²

The existence of *ius cogens* and *erga omnes* norms does show that States have put certain international rules over others, making them a pertinent candidate as far as common interests go.¹⁰³ However, as will be discussed later in this thesis, although these rules serve as a much needed starting point for deciphering the contents of international law, they have faced a thoroughly ambivalent response in the international community.¹⁰⁴

⁹⁶ Eisuke Suzuki, 'The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence' (1974) 1 *Yale Journal of World Public Order* 1, p. 5.

⁹⁷ Schachter, *International Law in Theory and Practice*, p. 27.

⁹⁸ André de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (the Hague, Kluwer Law International, 1996), pp. 9 and 17.

⁹⁹ Cassese, *International Law*, pp. 64-65 and 199.

¹⁰⁰ *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 13 April 2006, UN Doc. A/CN.4/L.682., paras. 361 and 374.

¹⁰¹ *Ibid.*, paras. 361-362; Cassese, *International Law*, p. 199.

¹⁰² *Case Concerning East Timor* (Portugal v. Australia), Judgment, ICJ Reports 1995, 90, para. 29; *Fragmentation of International Law*, para. 380; de Hoogh, *Obligations Erga Omnes*, p. 91; Cassese, *International Law*, pp. 64-65. However, obligations *erga omnes* should be distinguished from obligations *erga omnes partes*, which concern interests shared by a particular group of States bound by a treaty, see Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge, Cambridge University Press, 2005), p. 120.

¹⁰³ Since the ban on the use of force is in part a peremptory norm and thus hierarchically superior, *ius cogens* rules will be discussed in more depth than obligations *erga omnes*.

¹⁰⁴ For instance, it has been noted that while the *ius cogens* norms exist, they are both insufficiently defined and much too broad in scope, see Ulf Linderfalk, 'The Effect of Jus Cogens

Nevertheless, regardless of one's exact views on these concepts, it can be observed that they at least give guidance on which norms the international community views as being the most important. More specifically, it can be noted that ever since the birth of the United Nations, the primary global objective has arguably been preserving peace.¹⁰⁵ This essentially places a prohibition on the aggressive use of force at the forefront of global interests, perhaps even giving it a certain edge over other norms of *ius cogens* and *erga omnes*.¹⁰⁶

In this vein, it ought to be noted that the global values may not always manifest themselves as beacons of justice: sometimes they might instead be reflections of the commonly held necessities that keep the world community together. This premise is well-exemplified by the prohibition of the aggressive use of force, which is undeniably a peremptory norm.¹⁰⁷ However, the norms concerning armed force are also a direct result of certain realisations made by States following the two World Wars, most notably the need to prevent the reoccurrence of such wars at all costs.¹⁰⁸ This necessity may sometimes result in seemingly unpleasant decisions, such as choosing not to intervene in humanitarian catastrophes for the fear of violating the prohibition on the use of force.¹⁰⁹ Furthermore, it may be difficult to draw the exact lines for each value,¹¹⁰ especially when they are pitted against one another. After all, peremptory norms come in many shapes, which means that clashes between them can be unavoidable, consequently causing international actors to make difficult choices.¹¹¹

In any event, the various layers of the method's value-based premise are also reflected on the New Haven School as a whole, as it aims to observe the many faces of international law in a levelled manner. The method does not abandon the idea of an international normative system of sorts, nor does it adopt a thoroughly pessimistic view on international law as a legal discipline.¹¹² Rather, the New Haven School stresses the perspectives of the various actors of the international community, and their motivations

Norms: Whoever Opened Pandora's Box, Did You Ever Think of the Consequences?' (2007) 18 *European Journal of International Law* 853.

¹⁰⁵ Antonio Cassese, *International Law in a Divided World* (Oxford, Clarendon Press, 1986), pp. 65-66.

¹⁰⁶ The resolution of such conflicts of norms is naturally subject to individual conditions. However, it has for instance been argued that when clashing with the self-determination of peoples, the prohibition on the use of force prevails, see Antonio Cassese, *The Self-Determination of Peoples: a Legal Appraisal* (Cambridge, Cambridge University Press, 1995), pp. 199-200.

¹⁰⁷ *Fragmentation of International Law*, para. 374.

¹⁰⁸ UN Charter, Preamble.

¹⁰⁹ Gray, *International Law and the Use of Force*, pp. 34-35.

¹¹⁰ Schachter, *International Law in Theory and Practice*, p. 27.

¹¹¹ *Fragmentation of International Law*, para. 367.

¹¹² Higgins, *Problems and Process*, p. 1.

and abilities in making social decisions.¹¹³ These social decisions, while undeniably meant to serve the individual interests of the participants, are also interpreted as contributing towards the various common normative values of the community, ultimately serving international law as a legal system.¹¹⁴ Thus, the policies of individual States are seen as the ingredients that built the international community and laws which are aimed to govern it.¹¹⁵ As a result, despite containing a heavy dose of realism, the New Haven School regards international law with determined optimism, since it maintains that the discipline is a benefit, rather than a detriment, to both States and the global community as a whole.¹¹⁶

In addition, given its policy-oriented approach, the New Haven School steers away from the rocks often encountered by legal positivism, which first and foremost advocates a firm focus on the legal rules themselves, without too much regard to other factors or contexts.¹¹⁷ In fact, the New Haven approach in and of itself is a clear rebuttal of positivist outlooks on international law.¹¹⁸ Moreover, despite sharing certain notable common aspects, such as the emphasis on the perspective of different actors, the New Haven School also distinguishes itself from natural international law.¹¹⁹ In other words, the approach stands as an independent, sociologically-based legal method, which can be deployed to study any development of the use of force as well. This in turn means that the approach on hand fulfils the above-mentioned conditions and serves the purposes of this thesis, making it a fitting method to examine intervention by invitation with.

2.3. Further Reflections on the New Haven School

It has thus far been established that this dissertation will apply the method developed by the New Haven School, since it fulfils the requirements detailed above. However, certain additional remarks ought to be made about this methodological decision, which means discussing the New Haven approach and its core elements in a bit more detail. These remarks include observations on the inevitable cons that any method of law has.

¹¹³ Reisman 'View from the New Haven School', pp. 119-120.

¹¹⁴ Ratner and Slaughter, 'Appraising the Methods of International Law', p. 294; Laura A. Dickinson, 'Toward a "New" New Haven School of International Law?' (2007) 32 *Yale Journal of International Law* 547, pp. 548-549.

¹¹⁵ Ratner and Slaughter, 'Appraising the Methods of International Law', pp. 293-294; Harold Hongju Koh, 'Is There a "New" New Haven School of International Law?', (2007) 32 *Yale Journal of International Law* 559, p. 563.

¹¹⁶ Koh, 'Is There a "New" New Haven School of International Law?', p. 572.

¹¹⁷ Ratner and Slaughter, 'Appraising the Methods of International Law', pp. 293-294; Reisman 'View from the New Haven School', p. 119.

¹¹⁸ Ratner and Slaughter, 'Appraising the Methods of International Law', pp. 293-294; Reisman 'View from the New Haven School', pp. 119-120.

¹¹⁹ Reisman 'View from the New Haven School', pp. 119-120.

Furthermore, one should observe how the method relates to the use of force by States. Quite naturally, the notion of intervention by invitation is of specific interest, as is how the New Haven approach can be deployed to draw out pertinent research results on the said topic.

One ought to begin this examination by looking harder at the New Haven School itself. The core gist of the method's policy-oriented approach was introduced earlier in this chapter. However, the method's contents are naturally much more multi-layered than a brief explanation would immediately suggest. Still, as with any methodological approach, the exact elements of the New Haven School can be up for debate. Regardless of this, a couple of commonly accepted ingredients of the method can be observed. These ingredients contribute towards the analysis of how and why social decisions are made, which is at the heart of the New Haven School's manifesto.¹²⁰

First of all, the New Haven approach is by no means solely focused on the word of law itself, as it aims to include multiple factors and contexts in its analysis, ultimately building a socio-legal setting.¹²¹ For instance, it emphasises not only the proactive measures of different actors,¹²² but also their statements and opinions.¹²³ This means that when examining the development of any concept of international law, the method considers a wide variety of data produced by States and other participants within the global community.¹²⁴ Second, the method does not divide matters into clear paradigms, as instead it adopts transnational and interdisciplinary outlooks on the global community and its laws.¹²⁵ This further widens the scope of the sources exhausted in analysis, meaning that many factors ought to be considered when assessing international legal phenomena. Third, the method is always intended to consider the perspective of the decision-maker in international law, and thus acknowledges and dissects the factors that affected the decision in question.¹²⁶

Adding these components to the general outlook of the New Haven School leads us to a realisation about the method's compatibility with the themes of this dissertation: there is a discernible similarity between the New Haven School and the evolution of the use of force. As it has transpired, the method's emergence and development has happened in clear conjunction with the timeline of the UN era's regulation on armed force. Both were

¹²⁰ Koh, 'Is There a "New" New Haven School of International Law?', pp. 562-563.

¹²¹ Reisman 'View from the New Haven School', p. 120; Koven Levit, 'Bottom-Up International Lawmaking', p. 394.

¹²² Land, 'Reflections on the New Haven School', p. 923.

¹²³ Ratner and Slaughter, 'Appraising the Methods of International Law', p. 294.

¹²⁴ Reisman 'View from the New Haven School', p. 120.

¹²⁵ Koh, 'Is There a "New" New Haven School of International Law?', pp. 562 and 564.

¹²⁶ Reisman, 'View from the New Haven School', pp. 190-120; Reisman, Wiessner and Willard, 'The New Haven School', p. 578.

jump-started in the 1940s as responses to the Second World War, and were then subsequently practised while the political realities overtook and shaped the international community.¹²⁷ What is further, both notions are characterised by their emphasis on a preferred communal order: for the use of force this is manifested in collective security, for the New Haven School in common values and interests.¹²⁸ However, the misgivings and even failures of such frameworks do not create impossible obstacles for either notion, as they are capable of readjusting themselves to accommodate different contexts. Moreover, such developments have not taken place in a perfectly straight-forward manner, as multiple factors — both great and small, and at times not strictly legal — have left their imprint.¹²⁹

Thus, the New Haven approach in itself embodies the very same elements that have moulded the use of force as we have known it since the Second World War. This finding automatically binds the method to intervention by invitation as well. In fact, the connection between the New Haven approach and the use of force might be most prominently manifested in invited interventions. The current incarnation of consensual use of force is a direct result of a process involving policy-oriented decision-making,¹³⁰ the very same phenomenon that the New Haven School focuses on.¹³¹ To state it differently, there is a strong understanding between this dissertation's subject and the appointed method, which ought to provide solid theoretical basis for the analytical portions.

Despite this perceived compatibility, the selection of any method comes with unavoidable downsides along with the benefits. This is the case with the approach of the New Haven School as well. Firstly, as its name alone suggests, the New Haven School is a slightly more particular school of thought, at least when compared to traditional methodological approaches.¹³² Such particularity can be attributed to the approach's birth and subsequent development, which primarily took place at Yale Law School.¹³³ However, given the wide general applicability of the approach it would be difficult to

¹²⁷ Higgins, *Problems and Process*, pp. 238-239; Ratner and Slaughter, 'Appraising the Methods of International Law', p. 293; Anne Orford, 'Scientific Reason and the Discipline of International Law' (2014) *European Journal of International Law* 369, p. 379; Myres S. McDougal and Florentino P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order* (New Haven, New Haven Press, 1994), pp. 142-143.

¹²⁸ W. Michael Reisman, 'Article 2(4): the Use of Force in Contemporary International Law' (1984) 78 *American Society of International Legal Proceedings* 74, p. 76; Ratner and Slaughter, 'Appraising the Methods of International Law', p. 294.

¹²⁹ Higgins, *Problems and Process*, pp. 238-239.

¹³⁰ See Chapter III, Section 2.

¹³¹ Ratner and Slaughter, 'Appraising the Methods of International Law', pp. 293-294.

¹³² Orford, 'Scientific Reason and the Discipline of International Law', pp. 380-381.

¹³³ Ratner and Slaughter, 'Appraising the Methods of International Law', p. 293.

argue that the school of thought should be in any way geographically based. Such an argument would also go against the aforementioned components of the New Haven School, which *inter alia* advocate interdisciplinary and transnational outlooks on international law.¹³⁴

Secondly, concerns have been raised over certain aspects of the New Haven School's policy-oriented approach and its apparent disregard for the letter of the law alone.¹³⁵ After all, the method not only allows, but to a certain extent even advocates, modifying (in other words, violating) the law in accordance with the policies and decisions made by States, the would-be subjects of the same law.¹³⁶ This can result in arbitrary decisions, ones which may ultimately threaten the legal framework established by the Charter in regard to the use of force.¹³⁷ These worries certainly do not subside because this school of thought is based in the United States, which has not always been regarded as a champion of international law, particularly when its policies on the use of force are concerned.¹³⁸ However, as established earlier, this recourse to other contexts is necessary due to the indeterminate nature of international law.¹³⁹ Moreover, the New Haven School's adherence to commonly held values tethers the individual policies of States to a manageable setting, which by extension should alleviate the worst concerns on the matter. To state it differently, the sovereign interests are not allowed to run amok within the parameters of the New Haven School, as the most unspeakable violations of international law ought to be deflected by the method's outlook.

Thirdly, there has been uncertainty about the continued relevance of the New Haven School. Given not only the school of thought's aforementioned particularity but the timing of its golden years as well, one can question the footing the approach maintains in today's scholarly community.¹⁴⁰ After all, can a method conceived in such a clear timeframe and setting still hold significance? Despite these concerns, it can be discerned that a persistent group of New Haven practitioners does continue to exist, since the

¹³⁴ Koh, 'Is There a "New" New Haven School of International Law?', pp. 560, 562 and 564; Suzuki, 'The New Haven School of International Law', p. 30.

¹³⁵ Hengameh Saberi, 'Love It or Hate It, But for the Right Reasons: Pragmatism and the New Haven School's International Law of Human Dignity' (2012) 35 *Boston College International & Comparative Law Review* 59, p. 64.

¹³⁶ *Ibid.*

¹³⁷ Kleimann, 'Positivism, the New Haven School, and the Use of Force', pp. 38-39.

¹³⁸ *Ibid.*, p. 38; Saberi, 'Love It or Hate It, But for the Right Reasons', p. 64; Gray, *International Law and the Use of Force*, pp. 1-4.

¹³⁹ Higgins, *Problems and Process*, pp. 9-10.

¹⁴⁰ Reisman, Wiesenner and Willard, 'The New Haven School', p. 582.

approach is still championed by several scholars.¹⁴¹ In fact, one could even state that a ‘new’ New Haven School has emerged, which in turn emphasises the claim that the approach remains pertinent and thus applicable.¹⁴²

All in all, it can be concluded that while the New Haven approach does come with its bundle of problems, the method is still the best choice for this dissertation. Not only does it attend to the various issues that come with international law and the use of force, but it also offers valuable tools for decoding intervention by invitation more specifically. The method shares much common ground with invited interventions, which should result in relative harmony between these two. Thus, the core components of the New Haven School correspond to the fundamental elements of intervention by invitation, effectively furthering the objectives of this thesis.

¹⁴¹ Ibid.; Oona A. Hathaway, ‘The Continuing Influence of the New Haven School’ (2007) 32 *Yale Journal of International Law* 553, p. 554; Koh, ‘Is There a “New” New Haven School of International Law?’, pp. 560-561.

¹⁴² Koh, ‘Is There a “New” New Haven School of International Law?’, pp. 560-561; Dickinson, ‘Toward a “New” New Haven School of International Law?’, pp. 551-552.

3. The Structure of the Dissertation

Having established the relevant introductory matters, I will now set out the structure of the thesis, which has been formulated in accordance with the triad of research questions detailed above. Following the conclusion of this introductory chapter, the focus will shift to the international norms behind armed interventions to establish the legal basis pertinent to the research question (Chapter II). The matters discussed in the section include the relationship between the use of force and State sovereignty, the principle of non-intervention and the regime of State responsibility for internationally wrongful actions. The combination of these three regimes of international law has been chosen due to its specific relevance with regard to intervention by invitation.

Following this, the dissertation will move to the major analytical sections, which cover the three main research questions. These chapters comprise discussions on modern intervention by invitation as a legal concept, this concept's application in practice, and its current and future prospects. Of these analytical issues, the matter of defining intervention by invitation as a concept will be examined first (Chapter III). This conceptualisation discusses intervention by invitation's justification under the UN Charter's system, the reason behind its conceptual confusion, as well as the concept's position amongst other forms of armed force. Studying intervention by invitation in this manner will also provide the necessary context for the following sections of the thesis.

This legal concept of intervention by invitation will then be fleshed out by the second research question, the doctrine's application in practice (Chapter IV). Issues concerning the practice of intervention by invitation include issuing and redacting the invitation to intervene, as well as applying invited interventions under different circumstances. As noted above, this analysis will take place in the setting established by the preceding section, all the while supplying further basis for the third and final research problem.

The analytical sections will hence be concluded by studying the current and future prospects of invited interventions (Chapter V). The contents of this portion are based on the findings of the preceding sections, thus continuing the general continuum of the thesis. The topics of the section will therefore comprise the new circumstances in which intervention by invitation is applied. Namely, these new scenarios will use invited interventions as a means of merging unilateral and collective armed activities, including in the global fight against terrorism and within the context of collective security under the Charter. Furthermore, the chapter will examine applying the concept in different internationalised internal conflicts, from more traditional civil wars to secessionist ones. The section will then examine how these changed circumstances have affected the pool of States who exhaust intervention by invitation, pondering whether intervention by invitation still primarily belongs in the repertoire of the more powerful States. Finally,

the analysis will conclude with a discussion about the opportunity for State responsibility for intervention by invitation in light of modern developments.

Following the analytical sections, the thesis will be closed with general conclusions on invited interventions and their status in the international community (Chapter VI). The section rounds out the dissertation by concluding the core issues of the concept, its evolution since the beginning of the Cold War and how it appeared to be faring at the moment the thesis was finalised.¹⁴³ Therefore, the final section will offer findings on not only the overall process of intervention by invitation, but also what one could expect from the concept in the future.

A mention needs to be made of the order of the three main research questions. Given how varying State practice has affected intervention by invitation, the analytical examination of the doctrine could very well begin with its application. However, this dissertation has opted to begin with the concept's legitimisation first, and for a very simple reason: given how erratic the practice of intervention by invitation is, its analysis requires a legal backdrop against which it may be projected. Due to this reality, it is better to set a proper context by examining the contents of the legal concept first, a technique often seen in legal argumentation within academic circles.¹⁴⁴

When built on the analysis of legitimisation, the practice of invited interventions flesh out this established legal context even further, thus contributing to a well-rounded picture of the concept.¹⁴⁵ Moreover, while examining the issues concerning the practice of the doctrine, the analysis will also pave the way for the third research question, the present and future position of invited interventions. The conceptual context established by the first two analytical sections will thus be ended with the third one, ultimately fulfilling the study's objective.

¹⁴³ The events concerning intervention by invitation have been followed until 1 May 2018. All websites were last visited on this date as well.

¹⁴⁴ Schachter, *International Law in Theory and Practice*, p. 2.

¹⁴⁵ *Ibid.*

Chapter II

Establishing the Legal Basis for Armed Interventions

1. The Use of Force and State Sovereignty

1.1. The Foundations of Armed Force and Its Relation to State Sovereignty

Given the objective of this thesis, we must begin the examination of the legal basis with the relationship between the use of force and State sovereignty. To say that armed force by States and the notion of sovereignty are interlinked would be a vast understatement. In fact, the former cannot be examined without giving some regard to the latter. Over the centuries, the two concepts have participated in constant back-and-forth communication: this happened in solidarity in the past, but since the conclusion of the Second World War the relation has turned increasingly strained.¹⁴⁶ Balancing the different and occasionally conflicting needs of sovereignty with the regulation on the use of force is a difficult task, and, as demonstrated by the UN era, the perfect combination appears still to be in the making.

History has seen the two concepts co-exist in a more comfortable manner. Before the World Wars, a State's right to resort to force was widely regarded as being an integral part of Statehood and consequently sovereignty itself, making war a natural part of the discourse.¹⁴⁷ Such ideals can be traced back to Westphalian sovereignty, which afforded States the right to see their matters through as they saw fit, and preferably without outside intervention.¹⁴⁸ However, even centuries ago armed force was acknowledged to be a double-edged sword for States: although resorting to it came with the entitlement of sovereignty, it was also clear that doing so might result in the end of another State's existence.¹⁴⁹ Consequently, the international community attempted to limit tentatively the right to resort to force at different historical points, but with little success.¹⁵⁰

¹⁴⁶ Antonio Cassese, 'Return to Westphalia?' in Antonio Cassese (ed), *The Current Regulation of the Use of Force* (Dordrecht, Martinus Nijhoff Publishers, 1986), p. 505.

¹⁴⁷ Ibid.; Franck, *Recourse to Force*, pp. 9-11; Michael Howard, 'Temperamenta Belli: Can War Be Controlled?' in Michael Howard (ed), *Restraints on War: Studies in the Limitation of Armed Conflict* (Oxford, Oxford University Press, 1979), pp. 8-9; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge, Cambridge University Press, 2004), pp. 38-39.

¹⁴⁸ Cassese, 'Return to Westphalia?', p. 505; Philip Windsor, 'Superpower Intervention', in Hedley Bull (ed), *Intervention in World Politics* (Oxford, Oxford University Press, 1984), p. 45.

¹⁴⁹ Martin Dixon, *Textbook on International Law* (Seventh Edition, Oxford, Oxford University Press, 2013), pp. 322-323; Crawford, Brownlie's *Principles*, pp. 744-745.

¹⁵⁰ Franck, *Recourse to Force*, pp. 10-11; Lauterpacht, *Disputes, War and Neutrality*, p. 444.

As a result, the ever-looming possibility of States asserting their sovereignty with extreme measures became more probable during the first half of the 1900s, ultimately resulting in the First World War. However, this development did yield a counter-reaction, as the global conflict ended with the international community establishing the League of Nations, which made an effort to limit the use of force by States.¹⁵¹ The League of Nations Covenant even took tentative steps towards a more collective system on the use of force by making all possible wars a matter which concerned the entire League and its Members.¹⁵² Moreover, although it did not completely prohibit war, it demanded the contracting States to settle their disputes peacefully, first and foremost through the various forums provided by the League of Nations.¹⁵³ Only in the event of these forums proving insufficient was war an option.¹⁵⁴

In addition to the regulation of the Covenant, the Pact of Paris — adopted soon after the establishment of the League — also included similar provisions aimed at restricting the use of force by States, even going as far as explicitly renouncing war as a dispute settlement method.¹⁵⁵ Furthermore, the Pact echoed the Covenant's demand to resolve conflicts and disputes in a peaceful manner.¹⁵⁶ However, alongside the Covenant, these measures soon proved futile, as sovereign States took to enacting the use of force for their own political agenda: Japan's military intervention in Manchuria and Shanghai in 1931 is a prime example of such practice.¹⁵⁷ Hence, it can be stated that the former threats were at constant danger of being realised again.¹⁵⁸

These threatening scenarios became a global-scale reality during the Second World War, when the initial advancement of both Nazi Germany and the Soviet Union came with attempted and successful forceful annexations of other sovereign States.¹⁵⁹ The global war that soon followed suit forced the international community to rethink its position on settling matters with armed measures, and instead focus on ensuring stability

¹⁵¹ The Covenant of the League of Nations (28 June 1919, in force 10 January 1920), 225 CTS 195, Preamble; Howard, 'Temperamenta Belli', p. 11.

¹⁵² League of Nations Covenant, Article 11; Michael L. Glennon, *Limits of War, Prerogatives of Power: Interventionism after Kosovo* (New York, Palgrave, 2001), pp. 15-16.

¹⁵³ League of Nations Covenant, Articles 12-15; Glennon, *Limits of War*, p. 16.

¹⁵⁴ League of Nations Covenant, Article 16.

¹⁵⁵ The General Treaty for the Renunciation of War (27 August 1928, in force 24 July 1929), 94 LNTS 57, Article I.

¹⁵⁶ *Ibid.*, Article II.

¹⁵⁷ Hersch Lauterpacht, *International Law Volume 5: Disputes, War and Neutrality, Parts IX-XIV* edited by Elihu Lauterpacht (Cambridge, Cambridge University Press, 2004), p. 409.

¹⁵⁸ Franck, *Recourse to Force*, pp. 10-11.

¹⁵⁹ *Ibid.*, p. 11; Ian Brownlie, *International Law and the Use of Force by States* (London, Oxford University Press, 1963), p. 317.

and peace.¹⁶⁰ It was therefore not surprising that the end of the War and the dawn of the UN era was marked by an attempt to limit the right to resort to force, even if it meant dabbling with the concept of sovereignty in the process.¹⁶¹

The end result, codified in the United Nations Charter, is well known: States may only use force in self-defence, as otherwise armed measures are supposed to be at the discretion of the United Nations Security Council.¹⁶² The purpose of this scheme was to shift the focus of armed measures to a collective entity instead of individual States, for the purposes of international peace and security.¹⁶³ However, while the Charter was adopted with much fanfare and promise in 1945, even its drafting process was plagued with concerns over its actual applicability in practice.¹⁶⁴ The concerns were soon realised and resulted in the fragmentation of the regulation on the use of force, as the norms struggled to uphold the collective scheme of the Charter and the right of sovereign States to resort to force.

1.2. The Current Use of Force and Its Various Sources and Dimensions

1.2.1. United Nations Charter: Original Intent, Current Status and Interpretation

As with most norms of international law, the legal regulation of the use of force by States exists on multiple, overlapping and at times, slightly mismatching levels.¹⁶⁵ This naturally makes understanding the legal schematics of the matter rather difficult. Nonetheless, this much is clear: if one wants to examine the current regulation on the use of force, the primary source is the UN Charter, in which the norms on the matter are primarily codified.¹⁶⁶

The United Nations and its goals were born out of the still-smoking ashes of the Second World War.¹⁶⁷ The Charter, meant to act as the blueprint of the organisation, reflects this premise to the core.¹⁶⁸ The theme of wishing to stop the further destruction of mankind is evident from the first few sentences of the Charter's Preamble, and it is echoed throughout the instrument's subsequent provisions.¹⁶⁹ Thus, one of the instrument's cornerstones has

¹⁶⁰ UN Charter, Preamble; Gray, *International Law and the Use of Force*, pp. 6-7.

¹⁶¹ Franck, *Recourse to Force*, pp. 1-2 and 11; UN Charter, Preamble and Article 2(4).

¹⁶² UN Charter, Articles 2(4), 24, 39, 41-42, 51 and 53.

¹⁶³ *Ibid.*, Preamble and Articles 1(1), 2(4), 24, 39, 41-41, 51 and 53; *Friendly Relations*, Principle I; Gray, *International Law and the Use of force*, pp. 6-7 and 254.

¹⁶⁴ Franck, *Recourse to Force*, pp. 14-15.

¹⁶⁵ Cassese, *International Law*, pp. 55-57; Gray, *International Law and the Use of Force*, pp. 30-31; Franck, *Recourse to Force*, pp. 2-9.

¹⁶⁶ Franck, *Resourse to Force*, pp. 2-3; Crawford, *Brownlie's Principles*, pp. 746-747.

¹⁶⁷ UN Charter, Preamble.

¹⁶⁸ *Ibid.*, Preamble and Article 2(4).

¹⁶⁹ *Ibid.*, Preamble and Articles 2(4), 24, 39, 41-42, 51 and 53.

been the prohibition of the use of force coded in Article 2(4), which essentially removes the admissibility of States using force against one another as they saw fit.¹⁷⁰ Instead, a new world order was meant to be installed, one that championed scarce use of force which benefitted the global community as a whole.¹⁷¹

At first glance, the Charter's plan on the use of force is simple enough. Unilateral armed force is only permitted when a State has suffered an armed attack which triggers the right to self-defence.¹⁷² Otherwise, armed force was to be at the discretion of the Security Council, which was supposed to safeguard international peace and security.¹⁷³ This has been interpreted as an attempt to bring about a global regime reminiscent of national law enforcement: unilateral force is only allowable when absolutely necessary, and otherwise such measures belong to a collective entity tasked with maintaining safety.¹⁷⁴

It can also be seen as an initiative to further the goals first envisioned in the League of Nations Covenant and the Pact of Paris, both of which were adopted after the First World War and suggested clear limitations to the uses of force available for States.¹⁷⁵ Despite the relatively fast collapse of the League of Nations, the United Nations sought to take its plan on the use of force to a whole new level, one not yet witnessed by known history. Hence, the Charter sought to further the centralisation of force, a considerably lighter version of which had already failed under the League of Nations.¹⁷⁶

Despite these admirable aspirations, it is also well known that the scheme is yet to be applied to its fullest effect. In fact, the system — or lack thereof, should one get cynical — in place today can at best be described as the poor man's version of the plan introduced at the San Francisco Conference in 1945. Due to the immediate problems faced by the Security Council and its permanent members, the current plan has largely abandoned the initial role of collective security.¹⁷⁷ For many decades, collective security remained dormant, only existing in the unimplemented text of the Charter.¹⁷⁸ Although the Security Council has gained authority in the past couple of decades, collective security has still been doomed to play the role of a statistic who makes sporadic, short-lived appearances on

¹⁷⁰ *Ibid.*, Preamble and Article 2(4).

¹⁷¹ *Ibid.*, Preamble and Article 24.

¹⁷² *Ibid.*, Articles 2(4) and 51.

¹⁷³ *Ibid.*, Articles 24, 39 and 41-42; Gazzini, *Changing Rules*, pp. 17-18 and 129.

¹⁷⁴ John C. Yoo, 'Force Rules: UN Reform and Intervention' 6 *Chicago Journal of International Law* 641 2005-2006, pp. 643-645.

¹⁷⁵ Franck *Recourse to Force*, pp. 10-11; League of Nations Covenant, Preamble and Articles 11 and 16; The General Treaty for the Renunciation of War, Articles I and II.

¹⁷⁶ Lauterpacht, *International Law Volume 5: Disputes, War and Neutrality*, pp. 409-411 and 422.

¹⁷⁷ Franck, *Recourse to Force*, pp. 20-24.

¹⁷⁸ *Ibid.*, p. 21; Gray, *International Law and the Use of Force*, pp. 254-255.

stage.¹⁷⁹ This is partially because collective security as a globalist instrument is not truly such, as the organisation is yet to establish the UN-controlled troops who safeguard international peace and security.¹⁸⁰ In other words, the centralisation of armed measures has failed in many respects, meaning that a fully collective take on the use of force has not seen daylight outside the Charter's text.¹⁸¹

Instead, the billing has been studded with the most politically and militarily powerful States of the world, most prominently the United States and Russia (and formerly the Soviet Union): during the Cold War this duo was often joined by the United Kingdom and France.¹⁸² As such, the focus has been on unilateral forms of armed force, which have often pushed the legal limits of the Charter.¹⁸³ This has not only meant that the concept of self-defence has been tested, but also that other justifications not explicitly spelt out in the Charter have gained footing in legal argumentation.¹⁸⁴ The main topic of the thesis, armed intervention by invitation, is naturally one of them.¹⁸⁵ Other examples include the protection of nationals abroad and unilateral humanitarian intervention, but are not limited to these.¹⁸⁶

The misgivings of the Security Council are naturally at the centre of this modification. This makes one question how the current take on unilateral armed measures would have shaped if Chapter VII had been fully implemented from the outset. Imagining a world in which collective security acts exactly as it is set out in the UN Charter is very difficult. However, it is clear that the presence of any kind of centralised armed force would have had a tremendous effect on how unilateral measures would have developed. Any development aiming at the emergence of new unilateral forms of armed force would likely have met significant resistance, as opposed to the more accepting, albeit reluctant, stance taken in actual practice.

¹⁷⁹ Gray, *International Law and the Use of Force*, pp. 264-271; *UN Mission in Haiti*, SC Res. 940, 31 July 1994, UN Doc. S/RES/940, para. 4; *Sierra Leone*, SC Res. 1132, 8 October 1997, UN Doc. S/RES/1132, Preamble and para. 8; *Libya*, SC Res. 1973, 17 March 2011, UN Doc. S/RES/1973, para. 4.

¹⁸⁰ UN Charter, Article 43; Gazzini, *Changing Rules*, pp. 35-36.

¹⁸¹ Ramesh Thakur, 'Reconfiguring the UN System of Collective Security', in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford, Oxford University Press, 2015), p. 182.

¹⁸² Tanca, *Foreign Armed Intervention*, pp. 24, 27-28, 37 and 42; Ian Brownlie, 'The United Nations Charter and the Use of Force, 1945-1985' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers, Dordrecht, 1986), p. 501.

¹⁸³ Crawford, *Brownlie's Principles of International Law*, pp. 750-757 and 769-774.

¹⁸⁴ *Ibid.*

¹⁸⁵ de Wet, 'Modern Practice of Intervention by Invitation', p. 980.

¹⁸⁶ Cassese, *International Law*, pp. 366-368 and 373-374; Gazzini, *Changing Rules*, pp. 170-179.

The admitted failure to completely fulfil the purpose of the UN Charter has brought into question the proper approach to interpreting the instrument.¹⁸⁷ As established earlier, the Charter cannot be regarded as a black-letter convention that is tied to the limits of 1945,¹⁸⁸ which means that its interpretation is of upmost importance if the system wishes to perform even in a moderately successful manner. It has thus been suggested that the Charter should be viewed as comprising a continuous process, one which allows for the emergence of new modifications of the norms involved; even the ICJ is argued to have subscribed to this view.¹⁸⁹ A point of concern, however, can easily be identified. In international law, this type of modification often appears to be in the hands of the politically and militarily powerful, leaving other States to resume the roles of bystanders.¹⁹⁰ This means that the evolution of the use of force, amongst other international legal regimes, is mostly spearheaded by the select few, while others stay more silent when it comes to initiative.

What we have then is a worryingly frail shell of a system that is prone to the sometimes-questionable motivations of the powerful States. Of course, this premise would have been present even with the full scheme of the Charter in place: after all, the system of collective security was designed to make certain States more powerful than others.¹⁹¹ In fact, the Charter itself mentions the term ‘enemy States’ against whom force may be deployed, suggesting that a truly utopian union of all nations was perhaps never the ultimate goal of the organisation.¹⁹² Nonetheless, it remains clear that the Charter has not completely managed to disconnect the use of force from sovereign interests and concede it to a collective entity, in this case the Security Council. It would rather appear that the connection continues to stand, although with aspirations of a more global character.

1.2.2. Customary International Law: Reflections on Practice by States and UN Organs

Despite being codified in the Charter, the regulation of the use of force has continued to exist and evolve in customary international law.¹⁹³ In other words, the Charter did not mark the end of other legal evolution concerning the use of force. On the contrary, customary international law has played a markedly important part in the field of armed

¹⁸⁷ Franck, *Recourse to Force*, pp. 5-7; Gazzini, *Changing Rules*, pp. 1-2.

¹⁸⁸ Franck, *Recourse to Force*, pp. 6-7; Gazzini, *Changing Rules*, pp. 1-2.

¹⁸⁹ Franck, *Recourse to Force*, pp. 6-7; Gazzini, *Changing Rules*, p. 2; Gray, *International Law and the Use of Force*, p. 8; *Nicaragua*, para. 176.

¹⁹⁰ *Nicaragua*, paras. 205-207; *Corfu Channel Case* (United Kingdom v. Albania), ICJ Reports 1949, 4, p. 35.

¹⁹¹ Dixon, *International Law*, p. 345; UN Charter, Articles 24, 27(3) and 53.

¹⁹² UN Charter, Article 53; Kari Hakapää, *Uusi kansainvälinen oikeus* (Third Edition, Helsinki, Talentum, 2010), p. 507.

¹⁹³ *Nicaragua*, para. 176; Gray, *International Law and the Use of Force*, pp. 8-9.

force.¹⁹⁴ But how does customary international law fare when compared to its treaty counterpart? By how much does it differ? At first glance, not much. As noted by the ICJ in *Nicaragua*, the two sources are by no means identical, but the customary take on armed force is generally similar to that of the Charter.¹⁹⁵ In fact, the rules encoded in the Charter are reflective of pre-existing customary international law, which means that the core rules prohibiting the use of force would also bind States that are not parties to the Charter.¹⁹⁶ However, certain sprawling branches which cannot be found in the Charter exist, making them unique to customary international law.¹⁹⁷

These branches come with complications. The use of force is one of the more politically charged parts of international law, which has meant that State practice on the matter has often been confusing and even self-contradictory. This makes decoding the practice immensely difficult — and subsequently customary international law as a whole. However, some guidance on the matter can be sought from the practice of the UN organs, which over recent decades have made pronouncements on various matters concerning the use of force by States.¹⁹⁸ By the sheer virtue of their eminency, the decisions of the three major bodies, the Security Council, the ICJ and the General Assembly, ought to be at the centre of this consideration. Of these three organs, specific weight has been given to the Court, perhaps because as a judicial establishment, it is bound to offer well-rounded legal findings on the use of force. In comparison, the General Assembly and the Security Council are organs consisting of sovereign States, inevitably making their statements less objective in nature.¹⁹⁹

This reliance on the ICJ for guidance over the customary rules has not been unfounded. Although the Court was not an instant success in terms of the quantity of cases it resolved, it has surprisingly many judgments which concern the use of force by States.²⁰⁰ The most important is the judgment on *Nicaragua*, delivered in 1986, over a dispute between

¹⁹⁴ *Nicaragua*, paras. 175-177.

¹⁹⁵ *Ibid.*, paras. 174-176, 181 and 188; Gazzini, *Changing Rules*, pp. 118-119.

¹⁹⁶ *Nicaragua*, para. 176. Of course, it should be remembered that all internationally — or at least universally — recognised States are members of the United Nations.

¹⁹⁷ *Nicaragua*, paras. 176 and 188.

¹⁹⁸ See *inter alia* *Definition of Aggression*, Article 3; *Friendly Relations*, Principle I; *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 1368, 12 September 2001, UN Doc. S/RES/1368; *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 1373, 28 September 2001, UN Doc. S/RES/1373; *Corfu Channel*, pp. 9-12; *Nicaragua*, para. 15; *DRC v. Uganda*, para. 23.

¹⁹⁹ UN Charter, Articles 9(1) and 23(1).

²⁰⁰ See *inter alia* *Nicaragua*, para 15; *DRC v. Uganda*, para. 23; *Case Concerning Oil Platforms* (Islamic Republic of Iran v. the United States of America), Judgment, ICJ Reports 2003, 161, paras. 18-20; *Corfu Channel*, pp. 9-12; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, para. 1.

Nicaragua and the United States. The case concerned the US involvement in Nicaragua's civil strife, and it was *inter alia* alleged that former's actions had included supplying armed and financial support to the rebel *contras* in Nicaragua.²⁰¹ Due to jurisdictional limitations, the Court was unable to examine the matter in light of the Charter, and instead had to base its findings on customary international law.²⁰² The ICJ's findings on the matter have become a much-cited staple when one examines the use of force, in particular its customary dimension.²⁰³

While customary international law was generally found to be aligned with the Charter, it does exist as a standalone legal source.²⁰⁴ Consequently, there are certain dimensions, perhaps even legal exceptions, in customary international law alone.²⁰⁵ Subsequent scholarly evaluations of the case have interpreted it as a confirmation that the evolution of customary international law may affect the Charter itself as well, making the instrument into one that is evolving in nature.²⁰⁶ Hence, new customary international law can also shed new light on how the Charter's provisions on the use of force should be interpreted: after all, the rules contained in the Charter have been deemed as being subject to change when sufficient evidence has been presented within the international community.²⁰⁷ This interpretation appears to be backed by the Court as well,²⁰⁸ since it has accepted views which have modified the limitations on the use of force set by the Charter in 1945.²⁰⁹

Consequently, while the provisions of the Charter and the norms of customary international law do not match to perfection and thus technically exist as separate entities, they do share a symbiotic relationship. In fact, they maintain continued reciprocity with one another. Firstly, the Charter's regulation is reflected in customary international law, which also develops the regulation in accordance with the practice of the global community.²¹⁰ Secondly, this development in turn affects the interpretation of the Charter, allowing the instrument to adjust to the changes in State practice; this could even denote new exceptions to Article 2(4).²¹¹ Accordingly, the Charter ought to be mindful of

²⁰¹ *Nicaragua*, paras. 15 and 292.

²⁰² *Ibid.*, paras. 175-183.

²⁰³ Gray, *International Law and the Use of Force*, pp. 8, 75-78, 171; Hakapää, *Uusi kansainvälinen oikeus*, p. 495.

²⁰⁴ *Nicaragua*, paras. 176-178, 181 and 188.

²⁰⁵ *Ibid.*, para. 176.

²⁰⁶ Gray, *International Law and the Use of Force*, p. 8; Franck, *Recourse to Force*, pp. 6-7.

²⁰⁷ Gray, *International Law and the Use of Force*, p. 8; Franck, *Recourse to Force*, pp. 6-7; Gazzini, *Changing Rules*, pp. 1-2.

²⁰⁸ *Nicaragua*, para. 176; Gray, *International Law and the Use of Force*, p. 8.

²⁰⁹ *Inter alia* *DRC v. Uganda*, paras. 42-54 and 92-105.

²¹⁰ *Nicaragua*, para. 176; Gray, *International Law and the Use of Force*, p. 8.

²¹¹ Gray, *International Law and the Use of Force*, p. 8.

practice insisting that sovereign interests cannot yet be fully set aside, despite the document's initial plan.

Thus, despite their symbiosis, the customary dimension of the use of force does not tend to move international regulation towards the ideals established in the UN Charter. Rather, customary international law on armed interventions is tethered to the temperamental actions of States. However, as established by the ICJ throughout *Nicaragua*, international custom is not blind when it comes to the lopsided global community, as it does take into account the fact that armed interventions are most often enacted, and hence developed, by the biggest States.²¹² Such imbalanced State activities do not always necessarily result in new customary international law, especially if the actions are met with a negative response from the majority of the international community.²¹³ This threshold, while not firm and definite, does add an element of stability to the customary dimension of armed intervention, a necessary attribute given the many levels of legal regulation.

1.2.3. The *Ius Cogens* Aspect of the Prohibition and Its Legal Effects

As noted above, the current regulation on the use of force comes in many dimensions. One of them is yet to be examined in this chapter: when it comes to prohibition of the use of force, many international commentators often assert that, to a certain extent, the principle is a peremptory norm of international law.²¹⁴ This means that the core idea of the prohibition sits on top of the hierarchy of international law, leaving any contradictory notion powerless when pitted against it.²¹⁵ However, anyone monitoring the use of force by States can discern that this is not the case, bringing the peremptory dimension of the prohibition into question.

Indeed, the legal effect of the *ius cogens* aspect of the ban has been left unclear. This is due to two major factors. First, the idea of a peremptory norm, or a rule of *ius cogens*, is not quite clearly cut in international legal regulation, which means that it has not been steadily invoked in argumentation by different actors.²¹⁶ Consequently, the content and legal effects of such norms remain debated, leaving their place in practice slightly

²¹² *Nicaragua*, paras. 205-207.

²¹³ *Ibid.*

²¹⁴ *Fragmentation of International Law*, para. 374. This makes the ban an obligation *erga omnes* as well, as all *ius cogens* norms are owed towards the global community as a whole.

²¹⁵ André de Hoogh, 'Jus Cogens and the Use of Armed Force', in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, Oxford, 2015), pp. 1162-1164 and 1177; The Vienna Convention on the Law of Treaties (23 May 1969, in force 27 January 1980), 1155 UNTS 331, Articles 53 and 64.

²¹⁶ Cassese, *International Law*, pp. 209-210.

vague.²¹⁷ This connects directly with armed force: since the very idea of peremptory norms in general is debatable, the exact contents of the peremptory prohibition on the use of force are equally unclear as a consequence.²¹⁸ Second, many international norms have been presented as peremptory rules, which means that these concepts may sometimes contradict each other. For instance, it has been submitted that both the territorial integrity of States and the right to self-determination may qualify as peremptory norms, even though the most extreme form of self-determination questions the established international borders.²¹⁹

For these reasons, the idea of *ius cogens* norms, which bind all States despite their individual commitments and maintain primacy in case of normative conflict, has been regarded as deeply multifaceted and complicated.²²⁰ Those in favour of peremptory norms see them as a much-needed anchor in international law.²²¹ Such statements are understandable. International law is a difficult discipline to navigate due to its rich and often confusing variety of sources, and hence having a strong and unwavering starting point such as norms of *ius cogens* is alluring. However, critics of the concept have pointed out that such simplicity cannot exist within the various layers of international law, which does not have the clarity of a domestic legal system.²²² As such, the tempting straightforwardness of peremptory norms may be incompatible with the international legal framework, making their application difficult, sometimes perhaps even practically impossible.²²³

Hence, the very concept of a peremptory norm is in constant disarray. Identifying such norms and their limits can be an excruciating task, as many opinions on the matter exist. Still, the prohibition enshrined in Article 2(4) has partially been considered to be a peremptory norm.²²⁴ However, the exact scope of the peremptory dimension of the ban has been left unidentified. Nevertheless, defining the scope of this aspect of the

²¹⁷ Ibid.

²¹⁸ Natalino Ronzitti, 'Use of Force, Jus Cogens and State Consent' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers, Dordrecht, 1986), p. 150.

²¹⁹ Milena Sterio, *The Right to Self-Determination under International Law: "Selfistans", Secession, and the Rule of the Great Powers* (New York, Routledge, 2013), pp. 20-22.

²²⁰ *Fragmentation of International Law*, paras. 361-363; D. J. Harris, *Cases and Materials on International Law* (Fifth Edition, London, Sweet & Maxwell, 1998), p. 835-837; Crawford, Brownlie's Principles, pp. 594-597.

²²¹ Harris, *Cases and Materials*, p. 835-837.

²²² Ibid.; Crawford, Brownlie's Principles, p. 597.

²²³ *Armed Activities on the Territory of Congo* (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, ICJ Reports 2006, 6, para. 64; *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), ICJ Reports 2002, 3, para. 56; Crawford, Brownlie's Principles, p. 597.

²²⁴ *Fragmentation of International Law*, para. 374.

prohibition is crucial for the purposes of this thesis. As will later be demonstrated, host State consent to the use of force is not sufficient in cases in which the unlawful armed measures violate peremptory rules.²²⁵ Thus, tracing the general lines of the peremptory dimension of the prohibition even tentatively is of utmost importance.

We may as well state the obvious: the peremptory dimension of the prohibition does not include all forms of armed force. Reaching such a conclusion is an easy deduction, as the Charter itself allows for specific exceptions, namely those of self-defence and collective armed measures.²²⁶ In other words, the prohibition cannot be regarded as absolutely definite, which leaves some room for available armed measures.²²⁷ In addition, asserting that all forms of armed force not specifically mentioned in the Charter would automatically violate the peremptory aspect of the appears short-sighted, particularly if such actions have been approved by the majority of the members of the international community.²²⁸ After all, the general legal regulation on the matter makes a clear distinction between ‘regular’ uses of force and acts of aggression, with the latter being deemed to be much smaller in scope.²²⁹ Moreover, the various attempts to widen the scope of applicable armed force, both successful and unsuccessful, do suggest that States do not deem the entirety of Article 2(4) to be a rule of *ius cogens*.

Thus, the *ius cogens* aspect of the prohibition entails measures which amount to aggression against the victim State.²³⁰ In other words, acts which could trigger the victim State’s right to self-defence fall within the *ius cogens* scope of the prohibition.²³¹ In addition, acts which threaten the sovereignty or territorial integrity of the victim State can possibly qualify as violations of the peremptory sphere of the norm.²³² This indicates that uses of force which result in the modification of existing international territorial borders could violate norms of *ius cogens*. In the end, the peremptory aspect of the prohibition may be so limited that it scarcely becomes pertinent. However, despite its apparently small role in actual practice, the peremptory sphere may become important when examining invited interventions and the possible extent of host State consent.²³³ In any event, the peremptory sphere of the ban does not diminish or erase the historical link

²²⁵ Tanca, *Foreign Armed Intervention*, pp. 20-21.

²²⁶ UN Charter, Articles 2(4), 24, 39, 41-42, 51 and 53.

²²⁷ Tanca, *Foreign Armed Intervention*, p. 18; Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Helsinki, Lakimiesliiton kustannus, 1988), pp. 324-325 and 330-331.

²²⁸ Ronzitti, ‘Use of Force, Jus Cogens and State Consent’, p. 150.

²²⁹ See for instance the *General Assembly Resolution on the Definition of Aggression; Nicaragua*, para. 191; *Oil Platforms*, para. 51.

²³⁰ Hannikainen, *Peremptory Norms (Jus Cogens)*, p. 356.

²³¹ *Ibid.*; de Hoogh, ‘Jus Cogens and the Use of Armed Force’, p. 1173; Tanca, *Foreign Armed Intervention*, pp. 21-22; *Fragmentation of International Law*, para. 374.

²³² de Hoogh, ‘Jus Cogens and the Use of Armed Force’, p. 1173.

²³³ *Ibid.*, p. 1165; Ronzitti, ‘Use of Force, Jus Cogens and State Consent’, p. 149.

between the use of force and State sovereignty. It does add yet another regulatory layer to armed measures but does not completely remove them from the clutches of sovereign States.

1.3. Trampling the Line: Where Does the Current Connection Between the Use of Force and Sovereignty Stand?

1.3.1. Relationship in the External Relations of States

As stated earlier, armed measures by States are irrevocably tied to the notion of sovereignty itself. This much has been well-established, but the connection between the ideas is still far from being devoid of complexities. The right to resort to force has evolved from an integral part of sovereignty to something that international law has attempted to confine, mostly to preserve international stability and world order.²³⁴ As such, the relationship offers many takes on the international legal regulation involved. This has resulted in the norms on armed force being scattered and often disjointed, leaving their interpretation and analysis equally perplexing. While the current regulation of the use of force is complex and even contradictory in places, its clear aim has been to limit the sovereignty of States to resort to force.²³⁵ Whether or not this has been a success is debatable. Even though the regulation has arguably thus far upheld its goal of preventing another global-scale war, it has been unable to put an end to the tantrums of sovereignty which often dictate the use of force by States.²³⁶ This means that the Charter has not fully bestowed armed force to the United Nations, far from the hands of individual States.²³⁷

It would therefore appear that while the idea of centralised use of force is still uncontested in theory, in practice certain States have attempted to reassert their sovereignty according to their own wishes.²³⁸ In other words, the turn towards a more sovereign approach to the use of force already took place various decades ago, and this movement is showing little signs of slowing down.²³⁹ As a consequence, the globalist approach to the use of force has, save for occasional appearances, remained dormant in

²³⁴ UN Charter, Preamble and Article 2(4); Randall Lesaffer, 'Too Much History: from War as Sanction to the Sanctioning of War', in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, Oxford, 2015), pp. 35-36.

²³⁵ UN Charter, Preamble and Articles 2(4), 39, 41-42, 51 and 53; Franck, *Recourse to Force*, pp. 2 and 10-11; Cassese, 'Return to Westphalia?', pp. 505-506; Crawford, *Brownlie's Principles*, pp. 744-747.

²³⁶ Gray, *International Law and the Use of Force*, pp. 25-29; Cassese, 'Return to Westphalia?', pp. 505-507.

²³⁷ Franck, *Recourse to Force*, pp. 20-21; Cassese, 'Return to Westphalia?', pp. 505-507.

²³⁸ Gray, *International Law and the Use of Force*, p. 25-29.

²³⁹ *Ibid.*; James Crawford and Rowan Nicholson, 'The Continued Relevance of Established Rules and Institutions Relating to the Use of Force', in Marc Weller (ed), *The Oxford Handbook of Use of Force in International Law* (Oxford University Press, Oxford, 2015), p. 100.

practice. And indeed, not even the most devout supporter of the original Charter scheme would suggest that collective use of force is holding its place in an appropriate manner. Although it is now absolutely possible, collective use of force still remains far from being a probable option, let alone the primary mean of deploying armed force.²⁴⁰

Furthermore, collective force under Chapter VII has yielded to the demands of certain powerful States. This has left the practice a far cry from its initial plans, and instead it has been modified to accommodate unilateral use of force, indicating a reversion of power back to States themselves. For instance, the previous scheme of establishing armed forces solely under the command chain of the UN never came to be, even though collective armed measures themselves managed to break through into practical existence.²⁴¹ Enacting collective measures has instead been left to 'coalitions of the willing', which have often consisted of militarily active States.²⁴² The development has meant that the pure globalism of collective use of force has at least partially been compromised, leaving the legal framework in a distorted form between its planned position and the needs of powerful sovereign States.

Since Chapter VII should be a central piece of international regulation on the use of force, its current position is reflected on the system. And indeed, it would appear that the regime of armed force has not shaken its old habit of conforming to the needs of individual States.²⁴³ This means that armed force very much remains a tool which advances the sovereign needs of select States, instead of solely upholding international peace and order.²⁴⁴ In other words, the ability to resort to force is still connected to sovereignty itself, but perhaps slightly differently. Whereas in traditional times, using force was an inherent right of all sovereign entities, today it is an opportunity coveted and ultimately seized by the most assertive ones, which often leaves smaller States at bay.²⁴⁵ Thus sovereign interests, of some States at least, remain at the heart of the use of force, firmly linking the current system to individual State agendas.²⁴⁶

1.3.2. Developments and Issues Concerning the Internal Matters of States

Much of any debate over the use of force focuses on inter-State relations: after all, restricting the use of force between States is the primary purpose of the Charter's

²⁴⁰ Gazzini, *Changing Rules*, p. 63.

²⁴¹ UN Charter, Article 43; Gazzini, *Changing Rules*, pp. 35-36; *UN Mission in Haiti*, SC Res. 940, para. 4; *Sierra Leone*, SC Res. 1132, Preamble and para. 8; *Libya*, SC Res. 1973, para. 4.

²⁴² Gazzini, *Changing Rules*, pp. 43-49.

²⁴³ Schachter, *International Law in Theory and Practice*, pp. 106-107.

²⁴⁴ *Ibid.*

²⁴⁵ Lesaffer, 'Too Much History', pp. 35-36; Koskeniemi, *Politics of International Law*, pp. 126-127; *Corfu Channel*, pp. 34-35.

²⁴⁶ Schachter, *International Law in Theory and Practice*, p. 106.

system.²⁴⁷ Still, the relationship between State sovereignty and the use of force is not limited to external matters. In fact, one cannot deny the existence of an internal dimension, which deserves academic inspection as well, given the contents of this thesis.

Indeed, an additional aspect needs to be covered: the right of a sovereign to use force to restrain its subjects. This matter will be of importance later on in the thesis, once the practical requirements and limitations of invited interventions have been discussed. As will be explained later, the mere need to invite foreign armed intervention signifies a deep crisis in the host State. In such circumstances, the invited use of force is bound to affect the people of the country directly, even if not so targeted.²⁴⁸ The issue is not limited solely to invited interventions: the use of force by States always bears the risk of the loss of human life, a reason for its tight regulation.²⁴⁹

The idea that a sovereign State may do as it wishes, even if it harms its subjects in the process, was unproblematic for many centuries. The power of the sovereign was absolute and thus subjected to few derogations.²⁵⁰ Hence, if one follows the traditional Hobbesian take on the matter, citizens do not pose issues. The State is sovereign, and its subjects are simply subjected to the power held by the King— as their title already suggests.²⁵¹ Accordingly, the one who holds the position of sovereign may do as it wishes on the earthly plane and is thus not limited by the hopes and ideas of commoners.²⁵²

However, the current views do not correspond to this. In fact, in the last few centuries, many legal researchers have often tended to emphasise the idea of people behind the State being the legitimising factor of sovereign capacity, a notion which also appears in the modern international legal debate.²⁵³ In other words, the legitimacy of the sovereign stems from its people. Such a statement introduces us to a problem. If the source of a sovereign's power is its people, how can sovereign power be exercised against those people? This is important when using foreign armed force in a State's territory or against its people. How does this affect the capacity of inviting a foreign armed intervention, especially if it may be directed at the people of the State? Should the source of the sovereign mandate not invalidate this?

²⁴⁷ UN Charter, Preamble and Article 2(4).

²⁴⁸ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 860.

²⁴⁹ Cassese, *International Law*, p. 55; UN Charter, Preamble.

²⁵⁰ Thomas Hobbes, *Leviathan* edited by Richard Tuck (Cambridge, Cambridge University Press, 1991), pp. 120-121; Thomas Hobbes, *Man and Citizen (De Homine and De Cive)*, edited with an Introduction by Bernard Gert (Cambridge, Hackett Publishing Company, 1991), pp. 258-259.

²⁵¹ Hobbes, *Leviathan*, pp. 120-121.

²⁵² *Ibid.*

²⁵³ David Wippman, 'Pro-Democratic Intervention by Invitation', in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (Cambridge, Cambridge University Press, 2000), pp. 293-295.

In more modern legal argumentation, these matters connect to the principle of the self-determination of peoples, which may provide additional issues to the already unhinging relationship between sovereignty and the use of force.²⁵⁴ As its name suggests, the principle of self-determination aims to limit the actions of States in reference to their own populations.²⁵⁵ It *inter alia* obligates States to ensure the people's sufficient participation in the political processes of their homeland, and give safeguards to different groups of peoples who live in their territory.²⁵⁶ This should make the State's right to use force against its population much more complicated, as such force may be undertaken to put out an uprising or other demonstrations of the people.²⁵⁷ Furthermore, it can be questioned if uses of force deployed in a State's territory should base its legal justification directly to the people itself.²⁵⁸

Nevertheless, the dilemmas between the power of a sovereign and the rights of the people may be too convoluted, meaning that the principle of self-determination alone appears unable to solve them completely. The idea of the people, let alone the will of those people, is a multifaceted concept which has evaded thorough legal classification. In fact, it should be further noted that the principle of self-determination tends to focus on setting certain frameworks in which the people may participate in their homeland's matters: it largely stays quiet on the actual outcomes of democratic processes.²⁵⁹ Hence, the norm itself remains neutral on many substantial matters, instead choosing to focus on technical qualifications.²⁶⁰

In any event, a sovereign State's right to resort to force without any regard to its people has lost support among States, at least in the last few decades.²⁶¹ Of course, this does not automatically mean that the State has lost all its sovereign capacities in favour of the supposed democratic will of the people. This is because debates still rage over how much regard should be given to the will of the people, in particular since this could be difficult to extract and define properly. In addition, whether this is a lasting outcome remains to be seen. The current loss of popularity might be due to more superficial reasons which may not ultimately result in permanent legal regulation. Nonetheless, a return to the take on sovereignty as presented by Thomas Hobbes is evidently not on the cards. Instead, the

²⁵⁴ *Friendly Relations*, Principles I and V.

²⁵⁵ Sterio, *Right to Self-Determination*, p. 9.

²⁵⁶ Cassese, *Self-Determination of Peoples*, pp. 67-72 and 101-107.

²⁵⁷ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 860.

²⁵⁸ de Wet, 'Modern Practice of Intervention by Invitation', pp. 984-985 and 989.

²⁵⁹ Cassese, *Self-Determination of Peoples*, pp. 124-126.

²⁶⁰ See for instance *Friendly Relations*, Principle V.

²⁶¹ *Ibid.*; Tanca, 'Foreign Armed Intervention', pp. 48-49; Bannelier and Christakis, 'Under the Security Council's Watchful Eyes', pp. 860-861.

tides seem to be moving in the opposite direction, which also has an immediate effect on armed intervention by invitation.

1.4. Concluding Notions

To speak of the use of force is also to speak of sovereignty. In the earliest centuries marked by nation States, the ability to use armed force was a mark of sovereignty, as resorting to armed measures was a mantle that all States could claim. However, in the last century, the relationship between the two concepts has been in constant rotation, which has left the connection strained. Such strain was already visible during the era of the League of Nations, when the organisation attempted — ultimately unfruitfully — to restrict the use of force by sovereign States. Nevertheless, following World War II, this movement managed to culminate in the adoption of the UN Charter, which restricted the use of force to self-defence and collective armed measures.

However, the utopian plan of the Charter is yet to be realised in practice, since the idea of centralising the use of force to the Security Council was forced to yield in the face of the Cold War. Over the decades, this has led to certain States testing the limits of the use of force, often with the intention of reverting power to the biggest sovereign States. Such practice has meant that the use of force is often deployed to protect the sovereign interests of the powerful, leaving the global balance lopsided. Moreover, collective security, the crown jewel of the Charter's system, has been forced to conform to the persistence of sovereign interests even after the conclusion of the Cold War. This has resulted in the globalist aspirations of the concept being cast aside. To put it differently, the use of force remains non-centralised, and unilateral forms of armed intervention continue to dominate the field.

To conclude, the use of armed force continues to be linked to State sovereignty despite the international community's best efforts to reduce this connection in the aftermath of World War II. The entanglement has remained despite the adoption of the Charter and the grand ideas of collective security which soon turned out to be utopian. Although there have been new developments, the concept is still a far cry from what was imagined in 1945, meaning that the ultimate sovereign restraint not to use of force is yet to be found. Instead, sovereignty and armed force engage in a back and forth struggle, attempting to find a sustainable balance. This balance is further destabilised by the principle of non-intervention, which shares considerable overlap with the current system on the use of force. The perplexities concerning this norm will be discussed next.

2. The Notion of Intervention in International Law

2.1. The Basics and Birth of Non-Intervention in International Relations

2.1.1. The Concept of Intervention Throughout History

In the public eye, the term ‘intervention’ is used in international political rhetoric to the point of boredom.²⁶² More often than not, the notion is included in the vocabulary of States when they decry what they perceive as being intrusive acts by others.²⁶³ However, the evident overuse of the term has not meant that such claims have always been uncalled for. In fact, interventions by States into the affairs of others have been frequent throughout the history, all the way to the UN era.²⁶⁴ Still, this practice is not fully reflective of accepted international law, at least in the contemporary context.

For quite some time now, the international community has witnessed and encouraged a movement towards restricting the intervention of one State in the matters of another, now commonly known as the duty of non-intervention.²⁶⁵ At first glance, the principle is fairly clear-cut: States must refrain from intervening in affairs which essentially belong in the domestic jurisdiction of other sovereign nations.²⁶⁶ This principle, codified in customary international law, has a firm grounding in international relations — at least on paper.²⁶⁷ Nevertheless, as noted above, this apparent strength has not translated into practice quite as well. States continue to intervene in the affairs of others despite regulation, meaning it is pertinent to examine interventions in the history of international relations.

Since the concept of intervention into another State’s affairs, at least how we currently understand it, crystallised during the 1800s,²⁶⁸ beginning the examination from this era is the most sustainable option. During this time, some notable developments were the establishments of coalitions such as the Holy Alliance and other agreements which were

²⁶² Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law Volume I, Peace: Introduction and Part I* (Ninth Edition, London, Longman, 1992), p. 430.

²⁶³ *Ibid.*

²⁶⁴ Cassese, *International Law*, pp. 53-55; Hedley Bull, ‘Introduction’ in Hedley Bull (ed), *Intervention in World Politics* (Oxford University Press, Oxford, 1984), pp. 1-2; Windsor, ‘Superpower Intervention’, p. 45; George N. Barrie, ‘Forcible Intervention and International Law: Legal Theory and Realities’ (1999) *116 The South African Law Journal* 791, p. 791.

²⁶⁵ Jennings and Watts, *Oppenheim*, pp. 428-429.

²⁶⁶ *Ibid.*, p. 430; *Friendly Relations*, Principle III.

²⁶⁷ *Nicaragua*, para. 205; *Friendly Relations*, Principle III; *Inadmissibility of Intervention*, para. 1; *Rights and Duties*, Article 3.

²⁶⁸ Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (New York, Oxford University Press, 2001), pp. 22-23.

built upon the right to stage armed interventions on the contracting parties' territory.²⁶⁹ This development was of major importance, as it is often regarded as the first incarnation of intervention, including invited and collective interventions.²⁷⁰ Furthermore, the century became notable for various civil wars, and other States' stances on them: to intervene or not to intervene appeared to be the major question amongst the sovereign States. These musings had profound effects on the doctrine of belligerency, which would later become the staple used when examining civil wars in other States.²⁷¹

The beginning of the 1900s showed little signs of slowing down the willingness of States to intervene in the matters of their peers. The first few decades of the century were littered with interventions, often in military form, in the non-international armed conflicts of other States: examples include the civil wars of Finland (1918) and Spain (1936-1939).²⁷² However, the notion of armed intervention did face some significant opposition at the conclusion of the First World War, as during this time, the global community began to take its first tentative steps towards a more peaceful co-existence of States.²⁷³ Nonetheless, such a development failed to achieve lasting effects, as the world was soon plunged into yet another global conflict, which first began as smaller interventions turned into invasions in 1939 and 1940.²⁷⁴ The Second World War on the whole, of course, cannot be fruitfully examined as a basis for non-intervention, as the conflict represents a state of exception in international relations.

The period that followed the Second World War, however, offers a solid backdrop for legal evaluation. And indeed, the importance of interventions — and consequently the legal duty of non-intervention — has not wavered in the post-1945 era. On the contrary, the concept became one of the most prominent terms within the international community, as the Cold War was heavily built around politically powerful States intervening in smaller countries, either in military or non-military fashion.²⁷⁵ However, due to

²⁶⁹ Treaty of Alliance and Friendship, Great Britain - Austria, (Paris 20 November 1815), as cited in Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (New York, Oxford University Press, 2001), p. 22, Article 3; Chesterman, *Just War or Just Peace*, pp. 22-23; Cassese, *International Law*, pp. 29-30.

²⁷⁰ Cassese, *International Law*, pp. 29-30; Nolte, 'Intervention by Invitation', *The Max Planck Encyclopedia*, January 2010, para. 2.

²⁷¹ Fox, 'Intervention by Invitation', p. 833.

²⁷² Anne Van Wynen Thomas & A.J. Thomas Jr., 'International Legal Aspects of the Civil War in Spain, 1936-39' in Richard Falk (ed), *The International Law and Civil War* (The Johns Hopkins Press Ltd., London, 1971), p. 141; Fox, *Intervention by Invitation*, p. 823; Erik Castrén, *Civil War* (Helsinki, Suomalainen Tiedeakatemia, 1966), pp. 51-53.

²⁷³ Franck, *Recourse to Force*, p. 10; Howard, '*Temperamenta Belli*', p. 11.

²⁷⁴ Franck, *Recourse to Force*, p. 11.

²⁷⁵ John L. Hargrove, 'Intervention by Invitation and the Politics of the New World Order' in Lori Fisler Damrosch and David J. Scheffer (eds), *Law and Force in the New International Order* (Boulder, Westview Press, 1991), pp. 115 and 119; Ruth Wedgwood, 'Commentary on

developed international norms, the interventions of the UN era have had certain perks over their predecessors. In fact, the interventions post 1945 have tended to assert the intervenor's power in the target States in a more confined and controlled manner, which is of course preferable to full-scale conflicts.

This does not mean that intervention has been uncontroversial, especially from the perspective of international organs and commentators.²⁷⁶ After all, interventions of all sorts are meant to act as a catalyst for change, and on the international stage they inevitably result in modifying the *status quo* in another sovereign State. This means that although intervention is a preferable option to many concepts put into practice in the past, it is nevertheless a measure which requires identifiable and executable restrictions. The principle of non-intervention has been tasked with attaining such results.

2.1.2. Ideals Behind the Duty of Non-Intervention and Its Evolution

As noted before, while intervention has been more than a staple in international relations from time immemorial, the idea of its opposition in the legal sense did not fully emerge until the 1800s.²⁷⁷ This opposition came to be out of sheer necessity. Indeed, this century was marked by various intrusions by States into the affair of others, resulting in the idea of intervention becoming prevalent within the international community.²⁷⁸ Since then, the notion has made continuous appearances in international relations, necessitating the emergence of the duty of non-intervention.²⁷⁹ This principle aims to protect the sovereignty of each State by allowing them to decide upon their internal and external matters without outside involvement.²⁸⁰ The duty of non-intervention thus exists to prevent other States from intervening in matters which essentially belong to the domestic jurisdiction of others.²⁸¹ However, it does not create an impenetrable shield which makes every sovereign State immune to the criticism of its peers.²⁸²

In today's international law, the principle of non-intervention is a widely accepted norm of customary international law.²⁸³ It was notably omitted from the UN Charter as an explicit rule vis-a-vis States, but it is mirrored in the document in other respects: for

Intervention by Invitation' in Lori Fisler Damrosch and David J. Scheffer (eds), *Law and Force in the New International Order* (Boulder, Westview Press, 1991), p. 137; Gray, *International Law and the Use of Force*, pp. 84-85.

²⁷⁶ Jennings and Watts, *Oppenheim*, pp. 430-434.

²⁷⁷ Cassese, *International Law*, pp. 53-55.

²⁷⁸ Chesterman, *Just War or Just Peace*, pp. 22-23; Castrén, *Civil War*, pp. 38-46.

²⁷⁹ *Corfu Channel*, p. 35; *Nicaragua*, paras. 205-207.

²⁸⁰ *Nicaragua*, para. 205; *Rights and Duties*, Article 3; Cassese, *International Law*, pp. 53-55.

²⁸¹ *Nicaragua*, para. 205.

²⁸² Jennings and Watts, *Oppenheim*, pp. 432-434.

²⁸³ *Ibid.*, p. 429.

instance, Article 2(7) prohibits the United Nations from intervening in the domestic matters of its member States.²⁸⁴ However, these are only small reflections, resulting in customary international law being the primary legal source for the principle.²⁸⁵

This premise can be problematic, as any customary rule of international law consists of State practice and *opinio iuris*.²⁸⁶ In other words, customary rules evolve in response to State activities, which means that the duty of non-intervention is also subject to constant pressure within the international community.²⁸⁷ State activities on the matter, at least those of prominent States, have tended to not follow the limits or even the basic guidelines of established legal norms, creating a contradiction between the principle's legal limits and practice.²⁸⁸ Given the dependence on State practice and *opinio iuris* of any customary norm, said activities could result in the modification of the legal rule.²⁸⁹

This contradiction is yet another problem discussed by the ICJ in the *Nicaragua* case. While examining the case, the Court noted that when it comes to the principle, practice and established norms appear to clash, especially where intervention in favour of opposition groups was concerned.²⁹⁰ As readily admitted by the Court, this situation could have resulted in the modification of the duty of non-intervention.²⁹¹ Nevertheless, the Court did not view the existence of this particular collision as immediate evidence of new customary international law which had affected the principle.²⁹² It based this conclusion on several points. The Court *inter alia* stated that the aforementioned practice lacked clear legal argumentation and consequently intent, both of which are required to modify existing international customs.²⁹³ It was also hinted that much of this practice was not wide-spread enough to warrant the evolution of the principle of non-intervention.²⁹⁴ Moreover, the ICJ regarded much of the conflicting practice to be politically motivated in nature, which in its opinion undermined the importance and longevity of the actions' effect on customary international law.²⁹⁵

²⁸⁴ UN Charter, Article 2(7).

²⁸⁵ Jennings and Watts, Oppenheim, p. 429; *Nicaragua*, paras. 205-206.

²⁸⁶ *Nicaragua*, paras. 206-207; Scott, International Law in World Politics, pp. 46-48.

²⁸⁷ *Nicaragua*, paras. 206-207.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*; *Continental Shelf* (Libyan Arab Jamahiriya v. Malta), Judgment, ICJ Reports 1985, 29, para. 27.

²⁹⁰ *Nicaragua*, para. 206.

²⁹¹ *Ibid.*

²⁹² *Ibid.*, paras. 206-207.

²⁹³ *Ibid.*, para. 207.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

The ICJ's stance on the matter raises certain issues. After all, the entirety of international law, including the practice of States, is politically motivated by default.²⁹⁶ As a result, distinguishing worthwhile State activities from ones that should be discarded can be an almost impossible task at times. Perhaps more importantly, it may be impossible to perfectly objectively decide which State practice is free of a political agenda and which is not, particularly when interventions are concerned.²⁹⁷

However, the clear political motivations behind the State practice may result in said practice not being consistent enough. It is well known that consistency is required for such practice to be counted as relevant evidence of new customary international law.²⁹⁸ This makes the ICJ's stance in *Nicaragua* understandable: if one was to follow the practice of States with no discretion given to their agenda, the outcome would be confusing and unconvincing.²⁹⁹ Quite often the practice of States, in particular the powerful ones, is laced with hypocrisy which borders on, and sometimes crosses over to, being blatant. This makes the evaluation of such State practice difficult, as reaching sustainable findings which mark the existence of a long-standing legal practice is difficult.

Moreover, the fact that intervention is a tool reserved for the most powerful States in world may mean that the aforementioned practice lacks not only wide State practice, but *opinio iuris sive necessitatis* as well.³⁰⁰ It is in no way out of the ordinary to have only a handful of States handle the actual interventions, whereas the vast majority remains uninvolved.³⁰¹ In addition, more often than not the smaller and militarily more restrained States have opposed the activities of the superpowers, which can create divisions in the international community.³⁰² Such divisions inevitably separate the bigger and smaller

²⁹⁶ Jouannet, 'Koskenniemi: A Critical Introduction', p. 7.

²⁹⁷ This issue was already touched upon in Tuura, 'Intervention by Invitation and the Principle of Self-Determination', p. 195.

²⁹⁸ Scott, *International Law in World Politics*, p. 47; *Asylum* (Colombia v. Peru), Judgment, ICJ Reports 1950, 266, pp. 276-277; *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark and the Netherlands) Judgment, ICJ Reports 1969, 3, paras. 73-74.

²⁹⁹ Tuura, 'Intervention by Invitation and the Principle of Self-Determination', p. 195.

³⁰⁰ *Corfu Channel*, p. 35; *Nicaragua*, paras. 206-207.

³⁰¹ *Corfu Channel*, p. 35.

³⁰² *Inter alia The Situation in Hungary*, GA Res. 1004 (ES-II), 4 November 1956, UN Doc. A/RES/1004(ES-II), Preamble and paras. 1-2; *The Situation in Hungary*, GA Res. 1005 (ES-II), 9 November 1956, UN Doc. A/RES/1005(ES-II), Preamble and para. 1; *The Situation in Hungary*, GA Res. 1131 (XI), 12 December 1956, UN Doc. A/RES/1131(XI), Preamble and para. 1; *The Situation in Grenada*, GA Res. 38/7, 2 November 1983, UN Doc. A/RES/38/7, Preamble and paras. 1 and 4; *Effects of the Military Intervention by the United States of America in Panama on the situation in Central America*, GA Res. 44/240, 29 December 1989, UN Doc. A/RES/44/240, Preamble and para. 1.

powers, consequently leaving the development of the duty of non-intervention in a perpetual state of uncertainty.

2.2. Interventions of All Sorts: Where Does the Line Between Lawful and Unlawful Lie?

2.2.1. What Denotes a Violation of the Duty of Non-Intervention?

The current stance of non-intervention into the affairs of other States is based on understandable grounds: sovereign States wish to conduct their own matters without interference from outside influences.³⁰³ Such aspirations have emerged even more prominently in the aftermath of the two World Wars, similar to those concerning the use of force. One might even argue that the non-intervention in the affairs of others was one of the main influences behind the establishment of the United Nations.³⁰⁴ However, one must remember that the norm as such is not present in the organisation's Charter, even though the document does entail paying certain homage to the principle.³⁰⁵

As a legal norm, the duty of non-intervention comprises two aspects, both of which need to be present in a suspected violation.³⁰⁶ Firstly, breaching the principle requires that a State intervenes in a matter that is the sole discretion of another sovereign State:³⁰⁷ this intervention can take place either directly or indirectly.³⁰⁸ In other words, an intervention is only such when it concerns affairs that other States legally have no say in.³⁰⁹ Such affairs can include both internal and external matters of the State. For instance, each sovereign State should be entitled to decide upon its internal organisation without intrusion from others, just as it should be able to formulate its international relations as it wishes.³¹⁰

Naturally, the scope of the matters which belong to the national discretion of each sovereign State is not utterly limitless. After all, correspondence is the basis of international relations, and thus States at times must inevitably take a stance on the

³⁰³ Jennings and Watts, Oppenheim, pp. 428-430; *Inadmissibility of Intervention*, para. 1; *Rights and Duties*, Article 3.

³⁰⁴ UN Charter, Preamble.

³⁰⁵ *Ibid.*, Article 2(7).

³⁰⁶ *Nicaragua*, para. 205; Jennings and Watts, Oppenheim, p. 430; Bull, 'Introduction', p. 1.

³⁰⁷ *Nicaragua*, para. 205.

³⁰⁸ *Inadmissibility of Intervention*, para. 1; Jennings and Watts, Oppenheim, p. 430; Tanca, *Foreign Armed Intervention*, p. 17.

³⁰⁹ Rosalyn Higgins, 'Intervention and International Law', in Hedley Bull (ed) *Intervention in World Politics* (Oxford University Press, Oxford, 1984), p. 31; Bull, 'Introduction', p. 1.

³¹⁰ *Friendly Relations Declaration*, Principle III; *Rights and Duties*, Article 1.

conduct of others, be it on internal or international matters.³¹¹ Furthermore, since the duty of non-intervention is codified in customary international law, these lines can be subject to constant change.³¹² And indeed, these definitions and limitations have been exceedingly tested of late, meaning that either the contents or the core justification of non-intervention itself may be currently undergoing a trial. This notion will be elaborated on later in this chapter.

Secondly, the element of coercion needs to be present.³¹³ This means that the intervenor must have forced its actions upon the target State, in one way or another.³¹⁴ As with the act of intervening itself, coercion can take place either explicitly or implicitly.³¹⁵ The requirement of coercion is natural, as no intrusion can occur if the target State itself allows the particular action.³¹⁶ For instance, it is a different matter for a State to require assistance, as opposed to having such ‘assistance’ forced upon it. However, when does regular international correspondence cross over to the realm of intervention? After all, no community can exist without interaction, and this premise naturally applies in the global setting as well. Consequently, the notion of an unlawful intervention greatly depends on the perspective of States themselves, meaning that case-by-case evaluation is needed. If a State in question does not regard its rights as having been breached, the duty of non-intervention is also likely to have remained intact as.³¹⁷

One should further note that this requirement of coercion is a key element when it comes to armed intervention by invitation, the whole legality of which is based upon the consent of the host State. As intervention can only be unlawful if it is dictatorial, the duty of non-intervention does not pose many legal challenges to invited interventions.³¹⁸ However, this does not mean that the principle is without meaning in this context. Rather, it relocates these issues to the practical sphere of the doctrine, where the principle of non-intervention continues to govern several aspects and imposes many limitations. These practical aspects will be discussed in more detail later in this thesis.³¹⁹

³¹¹ Jennings and Watts, Oppenheim, pp. 432-434; Higgins, ‘Intervention and International Law’, pp. 31-33; Stanley Hoffman, ‘The Problem of Intervention’ in Hedley Bull (ed), *Intervention in World Politics* (Oxford University Press, New York, 1984), p. 8.

³¹² *Nicaragua*, paras. 205-207.

³¹³ *Ibid.*, para. 205; Maziar Jamnejad and Michael Wood, ‘The Principle of Non-Intervention’ (2009) 22 *Leiden Journal of International Law* 345, p. 348; Tanca, Foreign Armed Intervention, p. 17.

³¹⁴ *Nicaragua*, para. 205; Jamnejad and Wood, ‘Principle of Non-Intervention’, p. 348; Bull, ‘Introduction’, p. 1; Jennings and Watts, Oppenheim, p. 435.

³¹⁵ Hoffman, ‘The Problem of Intervention’, p. 9.

³¹⁶ Jennings and Watts, Oppenheim, p. 432.

³¹⁷ *Ibid.*, p. 435.

³¹⁸ *Ibid.*

³¹⁹ See Chapter IV, Sections 2 and 3.

2.2.2. Military and Non-military Interventions: The Core Difference

Merely concluding that some actions may result in a violation of the duty of non-intervention is not quite enough. Instead, once it has been established that certain types of interventions are unlawful, these acts can be further categorised into two types of measures, non-military and military.³²⁰ The main difference between these types of interventions is what their names already suggest: the latter includes the use of armed force, whereas the former does not.

Non-military intervention can occur in many ways, for example in the form of economic coercion and other measures which aim at influencing the domestic affairs of the victim State.³²¹ Such measures may be both explicit and implicit, both are equally unlawful.³²² It should be noted that economic coercion does not by itself amount to an armed measure.³²³ Although this statement appears obvious now, this has not always been the state of matters: in fact, when the prohibition on the use of force was formulated in 1945, many developing States suggested that economic measures be included in Article 2(4).³²⁴ However, this addition was eventually left out of the prohibition, meaning that unlawful economic measures, while they may constitute an unlawful intervention, do not amount to the use of force.³²⁵

This quick finding leads us directly to armed interventions themselves. Although it is much more limited in its scope, military intervention is exactly what the term suggests: an unlawful armed intrusion into another State.³²⁶ Such an intervention always entails the use of armed measures to an extent, and thus corresponds with the use of force. In other words, an unlawful armed intervention will inevitably occur in conjunction with a violation of the prohibition on the use of force as well.³²⁷ Since it comprises violations of both the duty of non-intervention and the non-use of force,³²⁸ unlawful armed intervention may take many forms, from small-scale measures to much more blatant ones.³²⁹ Such interventions can vary from limited activities, such as sending weapons and

³²⁰ *Friendly Relations*, Principle III; Bull, 'Introduction', p. 1.

³²¹ *Inadmissibility of Intervention*, para. 2; *Friendly Relations*, Principle III; Hoffman, 'The Problem of Intervention', p. 9; Bull, 'Introduction', p. 1.

³²² Jennings and Watts, Oppenheim, p. 430.

³²³ *Ibid.*, p. 431; Hoffman, 'The Problem of Intervention', p. 9; *Friendly Relations*, Principles I and III.

³²⁴ Hakapää, Uusi kansainvälinen oikeus, p. 490.

³²⁵ *Ibid.*; Hoffman, 'The Problem of Intervention', p. 9; Bull, 'Introduction', p. 1.

³²⁶ Tanca, Foreign Armed Intervention, p. 17; *Friendly Relations*, Principles I and III.

³²⁷ *Nicaragua*, para. 205; Jennings and Watts, Oppenheim, p. 431.

³²⁸ Tanca, Foreign Armed Intervention, p. 17.

³²⁹ Jennings and Watts, Oppenheim, pp. 435-436; *Inadmissibility of Intervention*, paras 1-2.

military assistance to non-governmental entities, to a fully-fledged armed intervention with the intervening State's own army.³³⁰

The connection between the duty of non-intervention and the prohibition on the use of force is sturdy in this regard, as a breach of the latter is bound to include a violation of the former as well. By default, armed interventions are slated to have a profound effect on the target States' internal matters, including their political order and affairs, which should belong to the sovereign discretion only.³³¹ In fact, it is not a stretch to state that the use of armed force tends to worsen the act of intervention in another State's affairs.³³² Thus, while all forms of intervention are considered undesirable at the very least, military interventions unmistakably pose the biggest threats.

And indeed, this continues to be the case in the UN era as well, despite the regulation on the matter. Armed interventions take place on a regular basis, and this may pose difficulties for both the customary, and thus modifiable, rule of non-intervention, and the inherently flexible ban on force.³³³ For the duty of non-intervention, however, perhaps the most perplexing forms of armed interference have taken place during another State's internal armed conflict, a matter which was initially meant to remain domestic even after the adoption of the UN Charter.³³⁴ This concerns many recent developments, and will thus be elaborated upon next.

2.3. The Duty of Non-Intervention and Its Development Since the Cold War

As the scope of interventions is wide, it is no surprise that a principle has emerged with hopes of limiting such activities. The duty of non-intervention aims to achieve just that. While the norm has a long-standing position in history, its appearances in practice have not been similarly convincing. In fact, we know numerous examples of States intervening in the matters of others, worryingly often in a military fashion. Such practice, however, has not always meant that States have sought to reform the customary duty of non-intervention, as on the surface, they have pledged their support for the principle's status and limits. This can be exemplified by the Cold War interventions, which were often undertaken due to the political necessities that plagued the global community.³³⁵

³³⁰ Jennings and Watts, Oppenheim, pp. 435-436; *Nicaragua*, para. 195; Gray, International Law and the Use of Force, p. 30; *Inadmissibility of Intervention*, para. 2.

³³¹ *Nicaragua*, para. 205.

³³² *Ibid.*

³³³ *Ibid.*, paras. 206-207; Franck, Recourse to Force, pp. 6-7; Gazzini, Changing Rules, pp. 1-2.

³³⁴ UN Charter, Articles 2(4), 2(7), 24, 39, 41-42, 43 and 51; Franck, Recourse to Force, pp. 40-41.

³³⁵ Tanca, Foreign Armed Intervention, pp. 24, 149, 159-161, 176-177, 179-184; Hargrove, 'Intervention by Invitation', pp. 115-119; Gray, International Law and the Use of Force, pp. 84-85.

The politically charged interventions of this era are not void of importance, but their effect on the duty of non-intervention and modern international law in general cannot be taken at pure face value.³³⁶

While the worst whims of the Cold War are still yet to be matched, recent practice on the principle of non-intervention does reflect the sentiment presented above. On paper, States continue to hold the duty of non-intervention in high regard. Nonetheless, practice has not fully followed suit, as interventions are a regular occurrence in contemporary international politics.³³⁷ Hence, while the end of Cold War initially raised hopes of fewer perceived violations of the duty of non-intervention, contemporary practice remains very different from such aspirations.³³⁸ Since the principle is based in customary international law, this practice inevitably leads to a problem: if the *opinio iuris* and State practice collide so magnificently, what effect does the collision have on the principle itself? In order reach a feasible conclusion, we should pinpoint where such developments have taken place, and what has been the general reaction to them.

Although interventions of many sorts have taken place following the end of the Cold War, conflicting practice has been perhaps most notably manifested in the interventions into non-international armed conflicts of third States.³³⁹ By the beginning of the UN era it had become clear that States must desist from intervening in such conflicts,³⁴⁰ but intrusions in civil wars were nonetheless a common occurrence during the Cold War.³⁴¹ Moreover, the last couple of decades have further shown certain further developments in this field. Such changes were in part instigated by the re-emergence of UN's collective security in the 1990s, when collective measures began to be applied in internal crises and full-scale conflicts.³⁴² This development essentially meant that civil wars could validly hold external interests as well,³⁴³ resulting in unilateral military interventions in such settings.³⁴⁴

³³⁶ *Nicaragua*, paras. 206-207.

³³⁷ Jamnejad and Wood, 'Principle of Non-Intervention', p. 352.

³³⁸ *Ibid.*, p. 346.

³³⁹ Gazzini, *Changing Rules*, pp. 31-32; Franck, *Recourse to Force*, p. 42; de Wet, 'Modern Practice of Intervention by Invitation', pp. 996-997.

³⁴⁰ *Rights and Duties*, Article 4; *Inadmissibility of Intervention*, para. 2; *Friendly Relations*, Principle III.

³⁴¹ Fox, 'Intervention by Invitation', p. 823.

³⁴² Franck, *Recourse to Force*, p. 41; Nigel D. White, 'The Relationship Between the UN Security Council and General Assembly in Matters of International Peace and Security', in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, Oxford, 2015), p. 299.

³⁴³ Franck, *Recourse to Force*, p. 41.

³⁴⁴ Christopher J. le Mon, 'Unilateral Intervention by Invitation in Civil Wars: the Effective Control Test Tested' (2002-2003) 35 *N.Y.U. Journal of International Law and Politics* 741, pp. 786-791; Eliav Lieblich, 'Intervention and Consent: Consensual Forcible Interventions In Internal

Naturally, interventions in internal conflicts did take place during the Cold War as well. However, during that time, States engaging in such interventions often had the decency to execute their actions in secrecy, leaving few activities for public inspection.³⁴⁵ Furthermore, when intervening in non-international armed conflicts, the interveners often denied that the situation in question had passed such a threshold, instead maintaining that the matter was that of internal unrest.³⁴⁶ This indicated that intervening in a civil war, although perhaps a measure *de facto* exhausted by some, was still considered to be unlawful. That these interventions are now deemed to be fit to bear the burden of publicity suggests that many States may also deem them to be in accordance with international law under certain circumstances. Moreover, at least one occurrence has gone further: during the current Ukraine crisis, when a Russian military intervention ultimately resulted in the annexation of the Crimean Peninsula by the latter.³⁴⁷

These changes have yet again raised questions about the position of the duty of non-intervention, and also the formulation created by the ICJ in the *Nicaragua* case. As noted earlier, the Court did not consider the emergence of conflicting State practice as such to be an immediate sign of changing customary international law.³⁴⁸ In other words, if one follows the findings of *Nicaragua*, contradicting practice may not absolutely denote the modification of the duty of non-intervention.³⁴⁹ However, it must have some effect, be it temporary or that of mere political disturbance. The types of interventions will be discussed in more detail later in the thesis, but a general observation can be made immediately.

Given the norm's status as a customary rule, the modern changes discussed above could indeed be seen as alluding to a possible dissolution of the duty of non-intervention, at least in certain respects.³⁵⁰ However, if one keeps *Nicaragua* in mind, reaching this conclusion seems slightly premature. Therefore, for the time being, the developments might better be described as having amended the requirements of an unlawful intervention, in particular the notion of a matter which essentially belongs to the sovereign

Armed Conflicts As International Agreements' (2011) 29 *Boston University International Law Journal* 337, pp. 350-356.

³⁴⁵ Anne-Marie Burley, 'Commentary on Intervention Against Illegitimate Regimes' in Lori Fisler Damrosch and David J. Scheffer (eds), *Law and Force in the New International Order* (Boulder, Westview Press, 1991), pp. 177-178.

³⁴⁶ Gray, *International Law and the Use of Force*, pp. 84-88.

³⁴⁷ *Territorial Integrity of Ukraine*, Preamble and paras 1-2 and 5-6.

³⁴⁸ *Nicaragua*, paras. 206-207.

³⁴⁹ *Ibid.*

³⁵⁰ Dapo Akande and Zachary Vermeer, 'The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars', *EJIL: Talk!*, 2 February 2015, <www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars>.

State only. In other words, it appears that the range of purely internal affairs has slimmed down, a development well exemplified by the multifaceted fight against terrorist organisations.³⁵¹ According to this logic, the aforementioned practices could be seen as manifestations of a more global world, where the lines between internal and international matters have begun to fade, perhaps to a point where definite distinctions are borderline impossible.³⁵² Muddling the definitions between domestic and global matters may have an effect on the principle of non-intervention, especially towards civil wars. Nonetheless, it does not diminish the fundamental duty which requires States to remain uninvolved in affairs purely belonging to others.³⁵³

To state it differently, the principle of non-intervention has not ceased to exist. Nevertheless, it would still seem that intervening in matters which, at least traditionally, have belonged to States themselves has once again become a public staple in international relations. In the end, intervention is a concept that will most likely never fully perish, at least as long as States form the world community. State discourse functions on interaction, and sometimes that interaction can cross accepted boundaries. Therefore, the duty of non-intervention should continue to retain its position in international law, even amidst modern, sometimes fast-paced developments. While it may be unable to curate the conduct of States fully, it still provides a framework within which States at least attempt to keep their argumentation and actions.

2.4. Conclusions

Intervention has been both an important and unfortunate part of international relations for many centuries. For a sovereign State it has a negative ring to it and is often perceived as a threat to any given State's internal matters. From the perspective of a globalist, however, it can present itself as an opportunity to resolve international matters, conflicts even. This dual nature of intervention has made it a perplexing concept. Consequently, the principle prohibiting such activities has not been wholly convincing in its attempts to confine the use of interventions in international relations.

Since the duty of non-intervention is based in customary international law, the principle may be subject to change more easily than norms codified in the Charter for

³⁵¹ Christian Henderson, 'Editorial Comment – The Use of Force and Islamic State' (2014) 1 *Journal on the Use of Force and International Law* 209, p. 210; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 864.

³⁵² Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 864.

³⁵³ Raphael Van Steenberghe, 'The Alleged Prohibition on Intervening in Civil Wars Is Still Alive after the Airstrikes against Islamic State in Iraq: A Response to Dapo Akande and Zachary Vermeer', *EJIL: Talk!*, 12 February 2015, <www.ejiltalk.org/the-alleged-prohibition-on-intervening-in-civil-wars-is-still-alive-after-the-airstrikes-against-islamic-state-in-iraq-a-response-to-dapo-akande-and-zachary-vermeer>.

instance. Of course, as the ICJ noted in *Nicaragua*, this development cannot be based on clearly politically-motivated State practice, which lessens the immediate influence of incoherent State activities. It does, however, create a problem with interpretation. Given the incoherency of the perimeter established by the ICJ and other actors, how can one identify a legally sustainable, objective manner of evaluating State practice concerning intervention in international relations?

Nevertheless, this premise can make the principle unpredictable in many senses. Whereas the use of force has various sources, albeit ones admittedly often trampled upon, the duty of non-intervention has not enjoyed similar codification. Even though its distant reflections can *inter alia* be found in certain parts of the Charter, it is completely manifested only within the depths of customary international law. The norms on the use of force can always find background and comparison points from the initial system as enshrined in the Charter: in other words, the evolution of these norms can follow a certain path, and thus be more easily traced. The duty of non-intervention does not have this perk. Instead, it ultimately remains a legal norm which depends on the whims of the most powerful States in the world, a situation that the doctrine in itself attempts to fight.

3. State Consent as a Legal Circumstance Precluding Wrongfulness

3.1. Introduction

We have thus far covered the legal basics concerning the use of force and its relation to State sovereignty, in addition to discussing the foundations of the duty of non-intervention in international affairs. Nevertheless, one last level still needs to be explored to understand fully the legality behind intervention by invitation: State consent and its effects on precluding the wrongfulness of any given State activity, including the use of force.³⁵⁴ At the heart of this analysis lies the principle of *volenti non fit iniuria*, according to which an illegal act is no longer such when the would-be victim gives consent, a stance that has been widely encoded in national law of sovereign entities since time immemorial.³⁵⁵ Before the days of the UN Charter, this principle was applied between States without much discretion, and it could be regarded as having been valid with respect to armed measures as well.³⁵⁶ However, in the current era, the principle's status is not quite as clear cut as it may find itself clashing with the modern regulation on the use of force, for instance.³⁵⁷

In contemporary international law, this issue is largely governed by the regime of State responsibility.³⁵⁸ This body of international norms has perhaps been most notably studied by the International Law Commission (ILC), which concluded a comprehensive report on the matter in 2001.³⁵⁹ While covering the many issues of State responsibility, the report also takes a clear stance on consent as an act which precludes wrongfulness, thus accepting it as an applicable concept under international law.³⁶⁰ Furthermore, the official

³⁵⁴ Ronzitti, 'Use of Force, Jus Cogens and State Consent', p. 148; Cassese, *International Law*, pp. 368-369.

³⁵⁵ Tanca, *Foreign Armed Intervention*, p. 15; Ronzitti, 'Use of Force, Jus Cogens and State Consent', p. 148; Cassese, *International Law*, pp. 368-369.

³⁵⁶ Cassese, *International Law*, p. 369. However, it can be questioned if it was necessary to invoke *volenti non fit iniuria* in reference to armed force in traditional law, given the lack of restrictive regulation on the matter. In other words, since use of force was not prohibited by default, there was no illegal act that needed to be legitimised with consent, at least in a manner comparable to today.

³⁵⁷ *Ibid.*, pp. 369-370; de Hoogh, 'Jus Cogens and the Use of Armed Force', pp. 1165-1167; Ronzitti 'Use of Force, Jus Cogens and State Consent', p. 148.

³⁵⁸ James Crawford and Simon Olleson, 'The Nature and Forms of International Responsibility', in Malcolm D. Evans (ed), *International Law* (Third Edition, Oxford University Press, New York, 2010), pp. 460-461.

³⁵⁹ James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press, 2002), Preface.

³⁶⁰ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), November 2001, UN Doc. A/56/10, Article 20.

commentary attached to the Draft Articles suggests that consent may validate certain uses of force that would otherwise be unlawful.³⁶¹ However, neither the Draft Articles nor their commentaries offer a comprehensive list of activities that can be legitimised by victim State consent, which leaves the matter much too ambiguous.³⁶²

In any event, solving the current status of *volenti non fit iniuria* requires an analysis of the doctrine of State responsibility. This means delving into the Draft Articles crafted by the ILC, particularly the portions that may affect the notion of State consent as a condition with which an illegal act is no longer such. Consequently, attention must be given to Article 20 (which covers the issue of consent), the commentary attached to it, as well as the international responses to the Draft Articles in general.

3.2. International Law Commission's Report on State Responsibility: The Rationale Behind Article 20

3.2.1. The International Law Commission's Work and Article 20 in General

Despite its vastness, the doctrine of State responsibility has been studied thoroughly over the years. The research has been undertaken by the ILC, which was tasked with crafting a report on the principles of State responsibility in international law. The assignment, which lasted for several decades and resulted in numerous preliminary reports, was finally concluded in 2001, when the Commission released its Final Draft Articles on State Responsibility.³⁶³ The Draft Articles were accompanied by a commentary, which took to explaining the contents, rationale and interlinked connections of the Articles.³⁶⁴

The Draft Articles form a comprehensive study on the various aspects of State responsibility over unlawful conduct in international law. As a consequence, when discussing State consent as a circumstance which negates wrongfulness, many legal scholars rightly bring up Article 20 of the Draft Articles on State Responsibility as presented by the ILC. In its final state, the Article reads as follows: 'Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.'³⁶⁵

The wording of the Article is straight-forward for an outcome of a global discussion that was spread over several decades. The work of the Commission on the Draft Articles,

³⁶¹ Crawford, International Law Commission's Articles, pp. 163-165.

³⁶² Ibid.; Ronzitti, 'Use of Force, Jus Cogens and State Consent', pp. 148-151.

³⁶³ *International Law Commission's Draft Articles on State Responsibility*.

³⁶⁴ Crawford, International Law Commission's Articles, Preface.

³⁶⁵ *International Law Commission's Draft Articles on State Responsibility*, Article 20.

including Article 20, was over 40 years in the making, and thus covers interpretation of international law over an extensive period of time.³⁶⁶ As a document by the ILC, the report on the Draft Articles is not by itself a legally binding source of international law. Nevertheless, the Draft Articles have been interpreted to reflect existing customary international law, giving them an immediate legal significance.³⁶⁷ In any event, the Draft Articles have become a staple when discussing the legalities of State responsibility, including State consent and its effects.³⁶⁸

Although it does not specifically refer to it by name, Article 20 of the ILC Draft Articles supports the principle of *volenti non fit iniuria* in international law in general.³⁶⁹ As the Article suggests, the consent of the victim is enough to remove the illegality of an act that would otherwise be unlawful. However, the extent of the principle's application can be questioned. The Article itself takes no stance on the matter, but the official commentary on the Draft Articles does suggest that consent cannot limitlessly legitimise otherwise unlawful acts.³⁷⁰ This begs the question, are there some acts, perhaps those concerning the use of force, which fall beyond the principle's scope?

And indeed, certain issues concerning Article 20's application exist in reference to the use of force. However, they do not mean that the Article is utterly inapplicable to armed measures. While it does not mention armed measures explicitly, the commentary on Article 20 has interpreted it as covering certain unlawful uses of force as well.³⁷¹ The examples of armed measures mentioned in the commentary include specific operations involving rescue and arrest and the stationing of foreign troops on another State's territory.³⁷² This commentary has also been supported by international scholars, who have regarded Article 20 as one of the basis for consensual use of force.³⁷³

Nevertheless, not all acts involving armed force can be covered by the consent of the host State.³⁷⁴ This is due to the aforementioned *ius cogens* aspect of the prohibition of

³⁶⁶ Crawford, International Law Commission's Articles, Preface.

³⁶⁷ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, 191, para. 398.

³⁶⁸ Cassese, International Law, pp. 243-244.

³⁶⁹ de Hoogh, 'Jus Cogens and the Use of Armed Force', pp. 1166-1167; Ronzitti, 'Use of Force, Jus Cogens and State Consent', p. 148.

³⁷⁰ Crawford, International Law Commission's Articles, pp. 163-165.

³⁷¹ *Ibid.*, p. 165.

³⁷² *Ibid.*, pp. 164-165.

³⁷³ Tanca, Foreign Armed Intervention, pp. 13-15; Byrne, 'Consent and the Use of Force', pp. 98-101; de Hoogh, 'Jus Cogens and the Use of Armed Force', p. 1167.

³⁷⁴ *International Law Commission's Draft Articles on State Responsibility*, Article 26; Vienna Convention on the Law of Treaties, Articles 53 and 64; Tanca, Foreign Armed Intervention, pp. 20-21; de Hoogh, 'Jus Cogens and the Use of Armed Force', p. 1165.

armed force, which makes the ban both a primary norm and a matter belonging to all States.³⁷⁵ All peremptory norms are automatically norms of *erga omnes* as well, which means that any State may make claims over the violations of such rules. In other words, host State consent alone is not enough to preclude the unlawfulness of the activities in question, making Article 20 inapplicable.³⁷⁶ In the end, this matter is debatable as the report itself decided largely to stay silent on the matter.³⁷⁷

3.2.2. Article 20 and Armed Interventions: Possible Limitations

Applying Article 20 to armed interventions is not absolutely free of complications, even though both the international community and various commentators have backed the existence of such a connection.³⁷⁸ And indeed, even though the Draft Articles and their commentary do not offer conclusive answers to the applicability and scope of Article 20, it has been asserted that it can be put to use in reference to armed force, only barring the most severe forms of armed intervention. While this premise has received general acceptance, certain legal questions remain. Most of these are concerned with the status of the prohibition on the use of force, a rule coded in the UN Charter and widely hailed as a cornerstone of international law. These concerns are addressed in this section. The nuances concerning non-intervention, although much smaller in the legal sphere, will also be discussed.

Most of the issues with applying Article 20 to the use of force concern the latter's status in international legal regulation. As a part of the Charter, the ban entailed in Article 2(4) enjoys primacy over obligations arising from other agreements, and through the use of interpretation, customary rules as well.³⁷⁹ In other words, other commitments should subsequently yield to it if they were to come into conflict with one another. Furthermore, the peremptory character of the prohibition³⁸⁰ must be considered. As all peremptory norms are obligations *erga omnes* as well,³⁸¹ they are also owed to States not immediately

³⁷⁵ Tanca Foreign Armed Intervention, pp. 20-22.

³⁷⁶ Ibid.

³⁷⁷ Crawford, International Law Commission's Articles, pp. 163-165.

³⁷⁸ de Hoogh, 'Jus Cogens and the Use of Armed Force', p. 1167.

³⁷⁹ UN Charter, Article 103; Dinah Shelton, 'International Law and "Relative Normativity"', in Malcolm D. Evans (ed), *International Law* (Third Edition, Oxford University Press, New York, 2010), pp. 162; *Fragmentation of International Law*, paras. 345 and 409. However, the exact effect and scope of the supremacy clause that is Article 103 is debatable, see *Fragmentation of International Law*, paras. 328-360.

³⁸⁰ *Fragmentation of International Law*, para. 347.

³⁸¹ Ibid., para. 404.

involved in the matter. This means that one State's consent is not enough to legitimise the use of force, as the entire international community would have to be consulted.³⁸²

Nevertheless, it would appear that suggesting Article 20 is completely inapplicable where the use of force is concerned has not gained much momentum.³⁸³ Instead, it has been argued that certain acts of armed force remain within the Article's scope, a view which is *inter alia* mirrored in the official commentary to the ILC's work.³⁸⁴ This can be attributed in part to the Charter's ability to reformulate itself in accordance with State practice, as it is not a legal instrument which should be interpreted in a fixed manner.³⁸⁵ Rather, it is a flexible set of norms which accommodate to the changes if necessary.³⁸⁶ In other words, while holding an elevated position, the Charter is not something which automatically rejects and nullifies any attempt to challenge it. Of course, this does not mean that the provisions of the Charter are completely obsolete. Moreover, the consent of the host State cannot limitlessly cover all military operations, given that the prohibition on the use of force is also in part a peremptory norm as well.

Still, as established before, the *ius cogens* aspect of the ban on use of force is more limited than Article 2(4) of the Charter in its entirety.³⁸⁷ The peremptory nature of the ban covers most extreme forms of armed force, such as armed attacks and actions which modify the territorial sovereignty of existing States.³⁸⁸ Hence, the use of force based on the consent of the host State should be allowable as long as it does not cross such thresholds. In such cases the peremptory aspect of the ban is not violated, meaning that other States have no agency in the matter.³⁸⁹

Whereas the use of force continues to be a conundrum in Article 20, the principle of non-intervention would appear to present a smaller, perhaps even non-existent, challenge. As the entire illegality of intervention depends on it happening against the other State's will, actions executed with valid consent from the sovereign entity should not pose a

³⁸² Tanca, *Foreign Armed Intervention*, pp. 20-22; *Barcelona Traction, Light and Power Co. Case* (Belgium v. Spain), ICJ Reports (1970), 3, paras. 33-34.

³⁸³ Byrne, 'Consent and the Use of Force', pp. 100-101; de Hoogh, 'Jus Cogens and the Use of Force', pp. 1166-1167.

³⁸⁴ Crawford, *International Law Commission's Articles*, pp. 163-165.

³⁸⁵ Gray, *International Law and the Use of Force*, p. 8; Gazzini, *Changing Rules*, pp. 1-2; Franck, *Recourse to Force*, pp. 6-7.

³⁸⁶ Franck, *Recourse to Force*, pp. 6-7; White, 'The Relationship Between the UN Security Council and the General Assembly', p. 296.

³⁸⁷ de Hoogh, 'Jus Cogens and the Use of Armed Force', p. 1167.

³⁸⁸ *Ibid*; Hannikainen, *Peremptory Norms (Jus Cogens)*, pp. 349-356.

³⁸⁹ Tanca, *Foreign Armed Intervention*, pp. 20-22.

threat to the principle.³⁹⁰ One can therefore observe that the duty of non-intervention with its own components solves the perplexities concerning State consent, meaning that no conflict between the principle and Article 20 of the Draft Articles occurs at all. Of course, under certain circumstances, intervention by default remains unlawful despite purported sovereign consent. Such situations include non-international armed conflicts, which are discussed later in this thesis.³⁹¹

3.3. Effects of Host State Consent: When Does State Responsibility Become Plausible?

The legality and applicability of armed intervention on invitation partially relies on the doctrine of State responsibility, more specifically the consent of the host State acting as a factor precluding the wrongfulness of the military intervention pursued on its territory.³⁹² This legal fact is attributable to Article 20 of the Draft Articles, which specifically enunciates that when valid consent is issued, a wrongful act can no longer be regarded as such. It has been argued that this clause can apply to military force as well.³⁹³ As it will be demonstrated later, this is a part of the optimal reasoning for the legality of intervention by invitation under the Charter's system. Treating intervention by invitation as an exception to the rule,³⁹⁴ the view holds that the use of force, which would otherwise be unlawful for contradicting Article 2(4) of the UN Charter, is validated by the genuine consent of the territorial State.³⁹⁵ However, this does not fully diminish the intervenor's responsibility over the use of force, nor does it come without certain complications.

Under normal circumstances, a victim State should be entitled to seek full reparation for the damage caused by the unlawful actions of another sovereign State, which in turn is under obligation to repair the injury.³⁹⁶ However, when the victim has validly consented to the illegal act, it will lose its right to invoke the responsibility of the other State, as the unlawfulness of the activity is no longer such.³⁹⁷ This clause applies to silent

³⁹⁰ Jennings and Watts, *Oppenheim*, p. 345; David Wippman, 'Military Intervention, Regional Organisations, And Host-State Consent' (1996-1997) 7 *Duke Journal of Comparative & International Law* 209, p. 210.

³⁹¹ See Chapter IV, Section 3.2.

³⁹² *International Law Commission's Draft Articles on State Responsibility*, Article 20; Crawford, *International Law Commission's Articles*, pp. 163-165.

³⁹³ Tanca, *Foreign Armed Intervention*, pp. 13-16; Crawford, *International Law Commission's Articles*, pp. 163-165.

³⁹⁴ de Wet, 'Modern Practice of Intervention by Invitation', p. 980.

³⁹⁵ Tanca, *Foreign Armed Intervention*, pp. 13-16; Ronzitti, 'Use of Force, Jus Cogens and State Consent', p. 148.

³⁹⁶ *International Law Commission's Draft Articles on State Responsibility*, Article 31.

³⁹⁷ *Ibid.*, Article 20.

acquiescence as well.³⁹⁸ For intervention by invitation in particular, this principle means that as long as the military activities stay within the limits of the host State's consent, the responsibility of the intervening State should be nullified.³⁹⁹ This, however, is only the default setting, as exceptions do exist.

Naturally, whenever an intervention exceeds the limits of the consent, the use of force pursued as a result will be a violation of the ban on armed force, as well as the duty of non-intervention.⁴⁰⁰ In such cases, consent as a factor precluding the wrongfulness is inapplicable, meaning that the victim State may demand reparation for injury as a result. Exceeding the scope of the invitation can happen in many ways. Examples include exceeding the timeframe set for the intervention, the number of troops that may be deployed and the forms and extents of specific military operations.⁴⁰¹ However, the use of force that is contained within the scope of the host State's invitation still retains its validity. Of course, depending on the agreement between the States over the use of force, the clause permitting the invitation may become void in the face of a breach, which may terminate the invitation as a result.⁴⁰²

In addition, certain actions cannot be validated by host State consent, even if said consent is otherwise properly issued: violations of *erga omnes* and *ius cogens* norms.⁴⁰³ These norms are owed to the international community as a whole, and hence an agreement between selected States cannot authorise measures that could breach them.⁴⁰⁴ The consent that removes the illegality of the use of force only applies between the contracting States, leaving others capable of making claims on the matter.⁴⁰⁵ Naturally, this also presents certain difficulties for authorising armed force: after all, the prohibition on the use of force in itself is partially a peremptory rule, begging the question of whether the territorial State may unilaterally consent to an armed intervention.⁴⁰⁶ However, as established earlier, this premise will not stop the practice of invited interventions as long as the use of force does not pass the threshold of an armed attack or similar activities against the host State.

Still, this legal fact limits the use of force that the host State may validly consent to; special care should be given to ensuring that the use of force does not violate the self-

³⁹⁸ Liebllich, 'Intervention and Consent', p. 349.

³⁹⁹ *The Definition of Aggression*, Article 3(e); Fox, 'Intervention by Invitation', p. 816.

⁴⁰⁰ *The Definition of Aggression*, Article 3(e).

⁴⁰¹ *Ibid.*

⁴⁰² Such situations are naturally individual to the specific conditions of each intervention.

⁴⁰³ *International Law Commission's Draft Articles on State Responsibility*, Article 26.

⁴⁰⁴ *Barcelona Traction Case*, para. 33; Tanca, *Foreign Armed Intervention*, pp. 20-22.

⁴⁰⁵ Tanca, *Foreign Armed Intervention*, p. 21.

⁴⁰⁶ Ronzitti, 'Use of Force, Jus Cogens and State Consent', pp. 148-149.

determination of the host State's people.⁴⁰⁷ Moreover, as mentioned above, the limitations imposed by the norms of *ius cogens* and *erga omnes* mean that States cannot invite foreign intervention with the purpose of executing violations of such rules, such as acts of genocide, war crimes or crimes against humanity.⁴⁰⁸ In addition, the severest uses of force are also exempt from the effects of Article 20. Hence, any intervenor who engages in such activities cannot use invitation as a condition that nullifies their responsibility: this proposition is well codified in both the ILC Draft Articles,⁴⁰⁹ and the law concerning international agreements.⁴¹⁰

This condition should not pose many difficulties, as one might hope that States would desist from knowingly taking part in such atrocious activities. Unfortunately, these activities are no oddities in the international community, as even the past few decades bear such events.⁴¹¹ What is further, the use of force always bears the risk of horrific consequences, including inadvertent ones. In other words, States may find themselves face to face with unexpected events, even when great care has been undertaken. For instance, airstrikes aimed at taking out terrorists can end up killing civilians or humanitarian aid workers instead.⁴¹² The responsibility for such acts cannot be erased by host State consent, which only covers so much.

3.4. Closing Remarks

The international responsibility of States for wrongful conduct can be complicated to examine. Nevertheless, the work of the ILC on the matter has been regarded as having reasonably neatly codified its regulation. In fact, the Draft Articles are considered to be a reflection of customary international law, at least in part,⁴¹³ and thus form a part of exhaustible legal regulation. When it comes to specific parts of the report, Article 20 has gained significant attention, and its rationale, valid State consent precluding the wrongfulness of otherwise unlawful conduct, is accepted among the international community and commentators.

⁴⁰⁷ Tanca, *Foreign Armed Intervention*, p. 24; Ronzitti, 'Use of Force, Jus Cogens and State Consent', pp. 151-152; *Friendly Relations*, Principle V.

⁴⁰⁸ Cassese, *International Law*, p. 371.

⁴⁰⁹ *International Law Commission's Draft Articles on State Responsibility*, Article 26.

⁴¹⁰ Vienna Convention on the Law of Treaties, Articles 53 and 64.

⁴¹¹ Robert Cryer, 'International Criminal Law', in Malcolm D. Evans (ed), *International Law* (Third Edition, Oxford University Press, New York, 2010), pp. 755-764.

⁴¹² Spencer Ackerman, 'US to release report on failings leading to airstrike on Afghanistan hospital', *The Guardian*, 27 April 2016, <www.theguardian.com/us-news/2016/apr/27/afghanistan-hospital-airstrike-pentagon-report>.

⁴¹³ *Bosnia and Herzegovina v. Serbia and Montenegro*, paras. 385, 398, 401, 414 and 420.

However, some confusion exists as to how Article 20 relates to the prohibition on the use of force, and how much of the norm it can cover. The commentary attached to the Draft Articles suggests that Article 20 is indeed applicable in certain military situations, including specific operations and stationing armed troops in another State's territory.⁴¹⁴ Still, the commentary steers clear of setting a definite set of limitations and classifications to follow.⁴¹⁵ However, with the exception of the gravest military measures, Article 20 is indeed applicable in situations in which the use of force is put into practice, including intervention by invitation. Nonetheless, the scope of Article 20 is not limitless. It does not apply to armed interventions which *inter alia* threaten or violate the *ius cogens* aspect of the ban on armed force, since territorial consent alone is not sufficient.⁴¹⁶

The proposition has complicated the realisation of State responsibility over invited interventions, as a successful application of Article 20 should effectively erase it. And indeed, even though consent cannot cover all forms of armed force, it should remove State responsibility if the intervention stays within acceptable boundaries. If the boundaries are crossed, however, State responsibility remains an opportunity. Still, one final realistic mention needs to be made. As we know full well, international law has few enforcement methods up its sleeve. In the context of the United Nations, those methods most prominently lie in the hands of the Security Council.⁴¹⁷ The effectiveness of the Security Council depends on its five permanent members, who have the power to veto any Resolution adopted by the organ.⁴¹⁸ This means that these members, many of whom are frequent intervenors, are infinitely capable of evading the responsibility of their wrongful conduct, a situation which is realised in practice various times.⁴¹⁹ Such a premise provides the select few with a *de facto* impunity against unlawful activities, one so strong that State responsibility as a doctrine may be unable to overcome it.

⁴¹⁴ Crawford, International Law Commission's Articles, pp. 163-165.

⁴¹⁵ *Ibid.*

⁴¹⁶ Tanca, Foreign Armed Intervention, p. 21; Ronzitti, 'Use of Force, Jus Cogens and State Consent', p. 148.

⁴¹⁷ UN Charter, Article 94(2).

⁴¹⁸ *Ibid.*, Article 27(3).

⁴¹⁹ *Inter alia* Record of the Security Council's 2718th Meeting, 28 October 1986, UN Doc. S/PV.2718, pp. 43 and 51; *Judgment of the International Court of Justice of 27 June 1986 concerning Military and Paramilitary Activities in and against Nicaragua: Need for Immediate Compliance*, GA Res. 41/31, 3 November 1986, UN Doc. A/RES/41/31, Preamble; Record of the Security Council's 7125th Meeting, pp. 5-6 and 18; Record of the Security Council's 7134th Meeting, pp. 2-4; Record of the General Assembly's 68th Session, 80th Plenary Meeting, 27 March 2014, UN Doc. A/68/PV.80, p. 8.

Chapter III

Intervention by Invitation — an Exception to the Rule?

1. The Emergence of Post-1945 Intervention by Invitation

Having established the regulation on armed intervention in the previous section, the dissertation will now present analysis of consensual use of force as a legal concept.⁴²⁰ Some might deem this conceptualisation to be redundant, given the apparent simplicity of intervention by invitation. Indeed, in the eras prior to the UN Charter, the use of force at the behest of the territorial State was not too controversial from the legal perspective.⁴²¹ With few firm legal limits in place, consensual use of force fitted well under the umbrella of *volenti non fit iniuria*; that is, if any use of force was considered unlawful to begin with.⁴²² In its contemporary form, however, armed intervention by invitation is in a class of its own. Some regard it only as a relic of traditional law which managed to weasel its way into the current order on the use of force, whereas others insist that it has gained the position of a perfectly legitimate, albeit problematic tool of the post-1945 era.⁴²³ In any event, intervention by invitation is an international legal doctrine in need of further examination, a task left unattended to by the vast majority of sources.

This premise can be attributed to the way the doctrine emerged following the adoption of the Charter. It is not a piece of dedicated law-making as the Charter itself, but rather a normatively scattered outcome of policies spearheaded by the most powerful States in the world.⁴²⁴ As much as it is a legal doctrine, intervention by invitation could just as easily be described as a superpower policy of the Cold War. Furthermore, when put into practice by these superpowers, intervention by invitation has often been criticised by less powerful States.⁴²⁵ Despite this, the global community has relented and allowed the doctrine to exist in modern international law.⁴²⁶

⁴²⁰ As noted earlier, this analysis will focus on intervention by invitation following the adoption of the UN Charter. Conceptualising the doctrine in this context offers more points of interest, many of which relate to the current regulation on the use of force overall.

⁴²¹ Schachter, *International Law in Theory and Practice*, p. 114; Cassese, *International Law*, pp. 368-369.

⁴²² Cassese, *International Law*, pp. 368-369.

⁴²³ *Ibid.*, pp. 369-370; Tanca, *Foreign Armed Intervention*, pp. 17-19; de Wet, 'Modern Practice of Intervention by Invitation', pp. 980.

⁴²⁴ Byrne, 'Consent and the Use of Force', pp. 98 and 101-102 and 124-125.

⁴²⁵ See *inter alia* Record of the Security Council's 2190th Meeting, 7 and 9 January 1980, UN Doc. S/PV.2190, paras. 28-29 and 79-81.

⁴²⁶ *Nicaragua*, para. 246; *Definition of Aggression*, Article 3(e); *Mali*, SC Res. 2100, Preamble; Crawford, Brownlie's *Principles*, pp. 769-770; Tanca, *Foreign Armed Intervention*, p. 17-19.

This relapse to superpower politics is explained by the reality which quickly eclipsed the idealism induced by the adoption of the Charter. By the 1950s, the utopias wistfully painted at the San Francisco Conference had begun to crumble. Instead, it had become clear that the fears underlying the Charter's drafting process had reached the surface: the world politics began to polarise, prompting difficulties for the new-born United Nations.⁴²⁷ This made it both necessary and possible for other forms of armed force to rise out of the shadows cast by the Charter. The endless deadlocks created by the permanent members of the Security Council also resulted in these very same members testing the waters for other military ventures, intervention by invitation included.⁴²⁸ In other words, the void caused by the incomplete implementation of collective security has provided, and continues to provide, grounds for invited interventions.⁴²⁹

Moreover, in conjunction with the troubles of the Security Council, intervention by invitation appeared as a solution to the various internal crises that began to command global attention.⁴³⁰ The United Nations and its Security Council were impeded from offering any resolution on such matters due to the aforementioned paralysis caused by the polarisation of superpower relations. In addition, it must be remembered that during the first few decades of the United Nations, it remained unclear how far the organisation could go in reference to internal crises of its member States: for instance, full-scale civil wars were apparently meant to stay out of the organisation's reach.⁴³¹ As the Security Council was unable to function properly, these deliberations were left unanswered until the end of the Cold War,⁴³² which further widened the vacuum that intervention by invitation exhausted.

Nevertheless, the deployment of intervention by invitation in these internal circumstances was not a completely antagonistic development. In fact, while it contributed to the crisis of the Cold War, consensual use of force also kept the polarisation of relations manageable. In other words, allowing the superpower States a means to exert their power prevented the Cold War from becoming an actual conflict. Hence, intervention by invitation not only helped in maintaining the balance of terror, but also kept it from tipping in a manner permitting the start of global scale war, possibly one involving the use of nuclear weapons. It could even be stated that intervention by

⁴²⁷ Franck, *Recourse to Force*, p. 21.

⁴²⁸ Crawford, *Brownlie's Principles*, pp. 750-757 and 769-774; Tanca, *Foreign Armed Intervention*, pp. 5-7, 17-19, 24, 111-113 and 116-122; Gray, *International Law and the Use of Force*, pp. 67-68 and 84-85.

⁴²⁹ de Wet, 'Modern Practice of Intervention by Invitation', p. 998.

⁴³⁰ Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1986) 56 *British Yearbook of International Law* 189, pp. 189-190.

⁴³¹ UN Charter, Articles 2(4), 2(7), 24, 39, 41-42, 43 and 51; Franck, *Recourse to Force*, pp. 40-41.

⁴³² Franck, *Recourse to Force*, pp. 40-41.

invitation was administered as first-aid when collective security faltered due to the Iron Curtain dividing the global community, thus making it a necessary evil of the time.

Consequently, despite being the result of undeniably negative developments, the resurgence of intervention by invitation also had a positive, even soothing effect in the political context of the Cold War. Still, since the focus of the doctrine was muddled by the international politics of the time, States did not bother exploring the precise legal justification behind consensual use of force. Even though the concept has continued to develop in the subsequent decades, this premise still stands today, which means that its exact justification is yet to be conclusively explained.⁴³³ Whether this is due to pure laziness or the reasoning being too convoluted to decode is debatable.

Whatever one's perspective on the matter is, the fact remains that the legal basis of intervention by invitation requires thorough examination. This has significance beyond the boundaries of this particular doctrine. After all, intervention by invitation is by no means the only legal proposition that has impugned the Charter. Other arguments, such as unilateral humanitarian intervention and the protection of nationals abroad, have been invoked as well, but they have arguably not met comparable success. This is an odd position given the unclear basis of intervention by invitation.

Due to these peculiarities, the focus of this section is on the concept's justification and place in international law. It will begin with discussion about the two main responses to the doctrine's lawfulness in order to resolve its hazy basis. Once the victor between the two has been established, the attention will shift to the connection of intervention by invitation to the uses of force described in the Charter. Following this, a portion will be dedicated to discerning why intervention by invitation has managed to cement its position while other ventures challenging the Charter have met more hostile responses. The chapter will be closed with final remarks on the reasoning behind intervention by invitation and the processes it has undergone since 1945.

⁴³³ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 860; de Wet, 'Modern Practice of Intervention by Invitation', p. 980.

2. The Major Responses to the Legality of Intervention by Invitation

2.1. Preliminary Remarks on the Legal Basis

The fact that intervention by invitation is legally allowable in today's international law means that it has long since ceased to face meaningful opposition.⁴³⁴ Suggesting that the practice is unlawful would clearly contravene not only State practice and *opinio iuris*, but also the stances of the most important UN organs.⁴³⁵ Despite this premise, many complexities concerning the doctrine's legal position persist, as States and other actors alike have been almost unwilling to elaborate on the exact justification behind the practice.

Therefore, the biggest issue concerns the precise legal basis of the doctrine, and how it relates to the Charter's provisions. This rather perplexing situation requires an inspection on the exact justification of intervention by invitation and its position in international law. However, before moving on to the specific responses to the lawfulness of intervention by invitation, we should first make certain preliminary observations about the effects of the legal norms which affect this concept. As the doctrine is that of armed intervention, two norms must receive attention during this examination: the use of force by States and the principle of non-intervention.⁴³⁶

Of these two principles, we should begin with the duty of non-intervention, as its relation to invited interventions is much simpler. Although intervention by invitation naturally concerns the duty of non-intervention as well, it has been maintained that the concepts are not inevitable adversaries.⁴³⁷ This is due to the premise that when an armed intervention is executed truly in accordance with host State's will, it does not constitute a dictatorial interference into that State's internal matters: in other words, by default the legal basis of invited interventions does not violate the duty of non-intervention.⁴³⁸ This does not mean that certain problems do not exist. However, these issues can be located in the doctrine's practice — upon which the principle of non-intervention imposes several limits — rather than its legal basis. Such limitations range from issuing the invitation to the different settings in which the interventions are applied, with perhaps the most

⁴³⁴ Crawford, Brownlie's Principles, pp. 769-770; de Wet, 'Modern Practice of Intervention by Invitation', p. 980-981; de Hoogh, 'Jus Cogens and the Use of Armed Force', p. 1167.

⁴³⁵ *Nicaragua*, para. 246; *DRC v. Uganda*, paras. 42-54; *Definition of Aggression*, Article 3(e); *Mali*, SC Res. 2100, Preamble.

⁴³⁶ Tanca, *Foreign Armed Intervention*, pp. 17-18.

⁴³⁷ *Ibid.*; Jennings and Watts, *Oppenheim*, p. 745.

⁴³⁸ Jennings and Watts, *Oppenheim*, p. 745.

important issue being non-international armed conflicts.⁴³⁹ These considerations on the practice of invited interventions and the duty of non-intervention will be discussed later in this thesis.

In any event, most of the issues involving the justification of intervention by invitation are related to the doctrine's connection to the use of force, in particular the contents of the Charter.⁴⁴⁰ The fact remains that the Charter only allows armed force in two situations: when a State is faced with an armed attack and must resort to self-defence, or when international peace is violated or threatened in a manner that activates collective security as described in Chapter VII.⁴⁴¹ The document makes no mention of the use of force with the consent of the territorial State. Therefore, no matter how this legal regulation is spun around, the legal basis for invited interventions as such cannot be found from it.⁴⁴² At the same time, the doctrine is clearly allowable in current international law. Given the position of the Charter,⁴⁴³ the instrument then must either implicitly allow intervention by invitation or have evolved in a manner which enables its usage.⁴⁴⁴

To solve this riddle, we should turn our attention to the practice of UN organs. As noted earlier, the Charter is an evolving instrument that responds to the development orchestrated by its bodies, as well as the member States. Notable practice by UN organs does exist on this matter,⁴⁴⁵ but it is not too helpful in solving the matter at hand. This is the case despite all three major bodies — the ICJ, General Assembly and Security Council — having taken a stance, in one way or another, on intervention by invitation as an applicable doctrine. As it has transpired, none of these bodies has deciphered the concept in a thorough manner, having preferred to examine intervention by invitation on a case-by-case basis instead.

This sentiment is readily exemplified by the ICJ, the principal organ when it comes to decoding intervention by invitation. While the Court has adjudged upon intervention by invitation in several cases by now, it has never seized the change to elaborate on the doctrine's exact legal basis in detail. For instance, in the *Nicaragua* case the Court simply found the practice to be 'allowable' in today's international law, but offered little to no

⁴³⁹ *Friendly Relations*, Principle III; *Rights and Duties*, Article 4; *Inadmissibility of Intervention*, para. 2; de Wet, 'Modern Practice of Intervention by Invitation', pp. 981 and 992-993.

⁴⁴⁰ The customary provisions on the use of force, while not absolutely identical to the Charter, follow the same general lines, see *Nicaragua*, paras. 181 and 188.

⁴⁴¹ UN Charter, Articles 2(4), 24, 39, 41-42, 51 and 53. The article allowing military measures against former enemy States is now considered obsolete.

⁴⁴² Nolte, 'Intervention by Invitation', *The Max Planck Encyclopedia*, January 2010, para. 14.

⁴⁴³ UN Charter, Article 103; *Fragmentation of International Law*, para. 409.

⁴⁴⁴ de Wet, 'The Modern Intervention by Invitation', pp. 980 and 998.

⁴⁴⁵ *Inter alia Nicaragua*, para. 246; *DRC v. Uganda*, paras. 42-54; *Definition of Aggression*, Article 3(e); *Mali*, SC Res. 2100, Preamble.

explanation for this claim.⁴⁴⁶ Another ICJ case, *DRC v. Uganda*, which discussed the practical limits of intervention by invitation in a much more detailed fashion, also falls short of offering thoughts on the doctrine's justification.⁴⁴⁷ This is not a usual position for the ICJ to take, as the Court is often unwilling to take a stance on legal matters which are not absolutely necessary to solve the case at hand.⁴⁴⁸ Still, the dilemma concerning invited interventions remains intact, as the Court's findings on the doctrine do not offer clear answers on its exact justification under international law.

Similar observations can be made about the General Assembly's and Security Council's approaches to invited interventions: although both have expressed their acceptance of the doctrine, they have done so either rather ambiguously or in reference to specific incidents.⁴⁴⁹ While the General Assembly recognised the doctrine in the *Definition of Aggression* (1974), it did so not only very fleetingly but also indirectly.⁴⁵⁰ Any subsequent mentions of invited interventions within the Assembly have tended to be of a similarly hazy nature,⁴⁵¹ which means that the practice of the organ is not the best source for examining the legal reasoning behind invited interventions. The Security Council has had the opportunity to discuss intervention by invitation many times, as it has often been called to deliberate the specific instances in which the doctrine has been applied.⁴⁵² However, in these cases the Council has not discussed the concept and its legal basis more generally. Its remarks on the topic are thus limited to individual incidents, and

⁴⁴⁶ *Nicaragua*, para. 246.

⁴⁴⁷ *DRC v. Uganda*, paras. 42-54 and 92-105.

⁴⁴⁸ See for instance the manner in which the Court dodged the matter of secession in its Kosovo Advisory Opinion, paras. 55-56.

⁴⁴⁹ See *inter alia* Record of the Security Council's 1443rd Meeting, 22 August 1968, UN Doc. S/PV.1443, paras. 9-12, 18, 41, 65-66, 167, 176 and 242-243; Record of the Security Council's 2190th Meeting, paras. 11-15, 32-33, 39, 89, 111, 128 and 138; Record of the Security Council's 2491st Meeting, 27 October 1983, UN Doc. S/PV.2491 paras. 51-77 and 418-428; Record of the Security Council's 2902nd Meeting, 23 December 1989, UN Doc. S/PV.2902, pp. 8 and 14; Record of the Security Council's 7125th Meeting, pp. 3-7 and 18; *Definition of Aggression*, Article 3(e); SC Res. 2100, Preamble.

⁴⁵⁰ *Definition of Aggression*, Article 3(e).

⁴⁵¹ When it comes to intervention by invitation, the Assembly is perhaps best known for occasionally condemning activities which the Security Council failed to deem unlawful, see *inter alia* *Effects of the Military Intervention by the United States of America in Panama on the Situation in Central America*, paras. 1-2; *The Situation in Grenada*, Preamble and paras. 1 and 4; *Territorial Integrity of Ukraine*, Preamble and paras. 1-2.

⁴⁵² *Inter alia* *Mali*, SC Res. 2100, Preamble; Record of the Security Council's 7125th Meeting, pp. 3-7 and 18; Record of the Security Council's 2491st Meeting, paras. 51-77 and 418-428; Record of the Security Council's 2190th Meeting, paras. 12-15. See also *Angola — South Africa*, SC Res. 387, 31 March 1976, UN Doc. S/RES/387, Preamble, wherein the Council noted that States have the right to ask for assistance but did not specifically state that this right applies with regard to the use of force.

their respective political contexts, from which forging a cohesive picture is considerably difficult.⁴⁵³

Of course, the Charter does not stand as the sole source of norms governing the use of force: customary international law on armed activities continues to exist and evolve alongside the Charter.⁴⁵⁴ However, the rules enshrined in customary international law are generally similar to the scheme of the Charter,⁴⁵⁵ and this is partially reflected in the legal stance to intervention by invitation. State activities and *opinio iuris* on intervention by invitation mirror the premise of uncertainty to a large extent, which is partially due to the doctrine often having been very controversial in practice.⁴⁵⁶ As such, both the argumentation on and rebuttals to such invited intervention have been laced with elements that make their interpretation quite complicated. At times, the claims made on these matters lack straight-forwardness to the point of pure evasion.⁴⁵⁷ This can be attributed to political strategy, as drawing definite lines for the doctrine could hinder its use in international policies. The ambivalence of intervention by invitation is thus not only a legal weakness but also a great political strength, which makes it an alluring option for States to exhaust.

Overall, it appears that although both State and UN practice on intervention by invitation is notably rich, neither as such offers conclusive findings on the doctrine's justification.⁴⁵⁸ Fortunately, the problems concerning the justification of invited interventions have gained attention in the scholarly community, which has debated the doctrine and its nuances for several decades. However, consensus is yet to be reached. Instead, two main arguments have gained support, with opposing takes.⁴⁵⁹

According to one of these responses, intervention by invitation is allowable because the prohibition entailed in Article 2(4) does not extend to use of force at the behest of the territorial State, denoting that such interventions are not in violation with prohibition to begin with.⁴⁶⁰ In the terms of the other, intervention by invitation has emerged as an

⁴⁵³ *Democratic Republic of Congo*, SC Res. 1234, 9 April 1999, UN Doc. S/RES/1234, paras. 1-2; *Mali*, SC Res. 2100, Preamble; Record of the Security Council's 3987th Meeting, 19 March 1999, UN Doc. S/PV.3987, p. 10; Record of the Security Council's 7125th Meeting, pp. 3-7 and 18; Record of the Security Council's 2491st Meeting, paras. 51-77 and 418-428; Record of the Security Council's 2190th Meeting, paras. 12-15.

⁴⁵⁴ *Nicaragua*, paras. 176-178.

⁴⁵⁵ *Ibid.*, paras. 181 and 188.

⁴⁵⁶ Cassese, *International Law*, pp. 369-371.

⁴⁵⁷ Tanca, *Foreign Armed Intervention*, pp. 138-140.

⁴⁵⁸ de Wet, 'Modern Practice of Intervention by Invitation', p. 980.

⁴⁵⁹ *Ibid.*; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 860.

⁴⁶⁰ Crawford, *Brownlie's Principles*, p. 769; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 860; de Wet, 'Modern Practice of Intervention by Invitation', p. 980.

exception to Article 2(4),⁴⁶¹ and can be attributed in part to the doctrine of State responsibility as codified in the Draft Articles by the ILC.⁴⁶² According to this argument, valid consent from the host State precludes the wrongfulness of the use of force applied on its territory, which would otherwise be in violation with the prohibition laid down in Article 2(4).⁴⁶³

While these responses have attained prominence in the work of commentators, none has yet been universally accepted as the explanation of the lawfulness of intervention by invitation. In fact, the doctrine has been allowed to operate without making a choice between the two arguments, resulting perhaps in unnecessary confusion over the matter. Given this premise, offering a sustainable answer to this dilemma will be the main objective of this section. Both responses will first be examined separately to spell out their strengths and weaknesses, and in the end compared with one another with the objective of discovering which proves more sustainable.

2.2. Arguing that the UN Charter Never Intended to Ban Intervention by Invitation

The first argument to be analysed is the one which holds that intervention by invitation is legally allowable because the UN Charter was not designed to prohibit it.⁴⁶⁴ In other words, this response maintains that the ban detailed in Article 2(4) does not cover armed force with the consent of the target State, which means that such practice does not violate the normative framework on the use of force.⁴⁶⁵ Out of the two main approaches to the lawfulness of invited interventions, this one is fairly straight-forward, and bound to please many lawyers. If one were to accept this argument, it would affirm that any legal norm, even one concerning the use of force, exists with clearly-cut limits that can be interpreted in an objective manner. Relying on such an interpretation would not require much jumping through legal hoops, a chance which many actors and commentators seem to be

⁴⁶¹ de Wet, 'Modern Practice of Intervention by Invitation', p. 980.

⁴⁶² The International Law Commission, Draft Articles on State Responsibility, Article 20; Crawford, 'The International Law Commission's Articles on State Responsibility', pp. 163-165; Tanca, Foreign Armed Intervention, pp. 13-16; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 860.

⁴⁶³ Tanca, Foreign Armed Intervention, pp. 13-16; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 860.

⁴⁶⁴ Schachter, International Law in Theory and Practice, p. 114; de Wet, 'Modern Practice of Intervention by Invitation', p. 980.

⁴⁶⁵ Schachter, International Law in Theory and Practice, p. 114; de Wet, 'Modern Practice of Intervention by Invitation', p. 980; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 860.

willing to seize. However, this apparent simplicity is only the thin surface, which hides notable issues underneath.

Still, we should lay out the pros of the response first. Its biggest strength is the apparent simplicity: intervention by invitation is allowed because it was never banned in the first place.⁴⁶⁶ Hence, the presence of invited interventions would not suggest that the scheme created by the Charter is in any kind of decline. The doctrine is simply a practice that was never outlawed, which means that it can be applied while also keeping the Charter's plan whole.⁴⁶⁷ A quick glance on the practice of invited intervention would suggest that the argument has attained some support by certain actors. One such actor appears to have been the United Kingdom, which has maintained in its own policies that such interventions fall outside the scope of the prohibition, meaning that they do not amount to unlawful use of force.⁴⁶⁸ Nonetheless, this line of argumentation has not been presented in a very thorough manner.⁴⁶⁹ Moreover, universal support for this argument is yet to be achieved among States, which have often opted to stay silent on the matter.

Supporting this approach would also advocate a clear-cut stance on the current use of force by States. The regulation banning said force has certain limits, and armed intervention by invitation happens to fall outside those restrictions. In other words, the concept is not a result of norm-bending developments that have taken place in the international community, but rather a case of strict formalism — the go-to approach of many lawyers. In fact, it is easy to see why the legal professional would present this argument over the lawfulness of intervention by invitation, as it appears to offer a neatly defined legal perimeter for the concept.

Nevertheless, the lawyer-appealing straight-forwardness of this argument may also be to its detriment. No matter how one puts it, international law is not a legal system that is immediately comparable to national ones, which means that traditional legal interpretation offers international lawyers only some of the necessary tools.⁴⁷⁰ The actions and statements of States are not always truly reflective of their true intentions, making

⁴⁶⁶ David Wippman, 'Military Intervention', p. 214; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 860.

⁴⁶⁷ Crawford, Brownlie's Principles, pp. 769; de Wet, 'Modern Practice of Intervention by Invitation', p. 980; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 860.

⁴⁶⁸ Geoffrey Marston (ed), 'United Kingdom Materials on International Law' (1986) 57 *British Yearbook of International Law* 487, p. 616.

⁴⁶⁹ *Ibid.*

⁴⁷⁰ Chittharanjan F. Amerasinghe, 'International Law and the Concept of Law: Why International Law is Law' in Jerzy Makarczyk (ed), *Theory of International Law at Threshold of the 21st Century: Essays in honour of Krzysztof Skubiszewski* (the Hague, Kluwer Law International, 1996), p. 79; Scott, *International Law in World Politics*, pp. 2-3.

their interpretation difficult.⁴⁷¹ This applies to armed force in particular, as it would simply be naive to claim that States would be unwilling to test the limits of legal regulation to meet their own political goals.⁴⁷² Hence, formalistic outlooks on the Charter and its scope will inevitably only scratch the surface, leaving any legal findings superficial.

It would also appear that the apparent simplicity of this approach is more misleading than it initially suggests. If the Charter was never intended to prohibit intervention by invitation, why is there still so much confusion about the doctrine and its justification? If its legal position was formally as clear-cut as this, such complexity should not exist. Logically speaking, the matter should have been settled a long time ago, meaning that no debate about the doctrine's legality should have arisen in the first place. Nevertheless, even though the lawfulness of consensual use of force is now widely accepted, in the initial aftermath of the Charter's adoption, some uncertainty existed over its legal position.⁴⁷³ It was not until the 1960s when questions about the doctrine had shifted to its practical qualifications.⁴⁷⁴ This indicates that the doctrine's legal position was not set in stone from the outset.

Furthermore, this response denies taking a stance on certain normative aspects of armed force in general. As stated before, the Charter makes no mention as such to the use of force with the consent of the territorial State.⁴⁷⁵ This means that the approach examined here is heavily focused on the exact wording of the prohibition described in Article 2(4) itself, and showing how its scope does not extend to invited interventions.⁴⁷⁶ However, the approach does not appear to consider the overall plan of the Charter and its objective to move military activities away from sovereign goals. After all, the Charter's vision did not seek merely to ban the use of force by individual States, as it also aimed for the centralisation of such armed measures to the United Nations and its main political organ, the Security Council.⁴⁷⁷

Given the spectacular failure of this centralisation, it is naturally quite difficult to imagine a world in which collective security was deployed in perfect accordance with the Charter's plan. Still, if this scheme had succeeded even somewhat, would the justification

⁴⁷¹ Scott, *International Law in World Politics*, pp. 121-123; *Nicaragua*, paras. 206-207.

⁴⁷² *Nicaragua*, paras. 206-207.

⁴⁷³ Tanca, *Foreign Armed Intervention*, p. 14; Cassese, *International Law*, pp. 369-370.

⁴⁷⁴ Tanca, *Foreign Armed Intervention*, pp. 150-151 and 157-161.

⁴⁷⁵ UN Charter, Articles 2(4), 24, 39, 41-42, 51 and 53.

⁴⁷⁶ Schachter, *International Law in Theory and Practice*, p. 114; Wippman, 'Military Intervention', p. 214; de Wet, 'Modern Practice of Intervention by Invitation', p. 980; Crawford, *Brownlie's Principles*, p. 769.

⁴⁷⁷ UN Charter, Preamble and Articles 1(1), 24, 39 and 41-42; Franck, *Recourse to Force*, pp. 2-3 and 21-23.

of intervention by invitation be quite so simple? In such a world the doctrine would inevitably find itself at odds with collective security, especially if the latter was applied in its purest form with Article 43 fully implemented. However, as matters currently stand, intervention by invitation and collective security do not necessarily contradict one another, as both are put into practice by individual States. This tentative compatibility has been enacted in practice by the recent military intervention in Mali, which began in 2013 and has since encompassed both consensual use of force and collective armed measures.⁴⁷⁸

In addition, the response discussed in this section is inevitably grounded on the more limited view of the prohibition of the use of force, as it attempts to show that not all unilateral armed force between States was meant to be banned by the Charter.⁴⁷⁹ As noted earlier, such interpretations of Article 2(4) have previously been met with a frosty response from actors such as the ICJ.⁴⁸⁰ This stance can be traced well back into the work of the Court. In the *Corfu Channel* case, the United Kingdom apparently argued that its activities in Albania's territorial waters were *inter alia* justified because Article 2(4) only bans the use of force which violates or threatens the 'political independence' or 'territorial integrity' of the target State.⁴⁸¹ This marked one of the first appearances of what is known as the limited view to the prohibition.⁴⁸² The Court did not address this particular claim in detail, but it did reject the United Kingdom's argumentation on its operations, and ultimately adjudged that the State had acted in contradiction with its international obligations.⁴⁸³ This has been interpreted as an unwelcoming reaction to the limited approach,⁴⁸⁴ a stance supported by international commentators.⁴⁸⁵

One last problem should be addressed in reference to contending that intervention by invitation was never prohibited by the Charter. As noted earlier, one cannot deny that the Charter itself takes no direct stance on the use of force with the consent of the host State. Consequently, readily accepting that the Charter never meant to ban the practice may open a Pandora's Box, which allows other forms of armed force not specifically prohibited in the Charter to emerge as valid armed measures, solely on the basis that the

⁴⁷⁸ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 868; Mali, SC Res. 2085, 20 December 2012, UN Doc. S/RES/2085, Preamble and para. 9; *Mali*, SC Res. 2100, Preamble.

⁴⁷⁹ Schachter, *International Law in Theory and Practice*, p. 114.

⁴⁸⁰ *Corfu Channel*, pp. 34-35; Brownlie, *International Law and the Use of Force*, pp. 267-268.

⁴⁸¹ *The Corfu Channel Case — Oral Proceedings (First Part)*, Minutes of the Sittings Held from November 9th, 1948, to April 9th 1949 (Verbatim Record), p. 296.; *Corfu Channel*, pp. 34-35; Harris, *Cases and Materials*, p. 865.

⁴⁸² Harris, *Cases and Materials*, p. 865; Gray, *International Law and the Use of Force*, p. 32.

⁴⁸³ *Corfu Channel*, pp. 34-36; Harris, *Cases and Materials*, p. 865.

⁴⁸⁴ Harris, *Cases and Materials*, p. 865.

⁴⁸⁵ *Ibid.*; Brownlie, *International Law and the Use of Force*, pp. 267; Gray, *International Law and the Use of Force*, p. 32.

Charter does not explicitly ban them. Means to combat such options do exist, *inter alia* by arguing that if those forms were allowable, they should have emerged either immediately or soon after the adoption of the Charter. Nonetheless, accepting that the lawfulness of intervention by invitation is based on the Charter not expressly prohibiting it does open unappealing opportunities, slim as they might be in practice.

For these reasons, it is unlikely that the approach discussed here offers sustainable answers on the lawfulness of intervention by invitation. The claim that the Charter never banned intervention by invitation seems simple enough on the surface, but a closer inspection shows many flaws. Hence, we need to look deeper into the functioning of the international legal system, a matter tackled by the second response to the basis of intervention by invitation.

2.3. The Exception Argument Based upon State Responsibility

Another major approach to the lawfulness of intervention by invitation is the exception route. It acknowledges that the doctrine was intended to be covered by Article 2(4) of the Charter, and asserts that it has emerged as an exception to this prohibition.⁴⁸⁶ The legal basis of this exception has been further connected with the doctrine of State responsibility, which offers the valid consent of the victim State as a circumstance that negates wrongfulness.⁴⁸⁷ It has been argued that this position is applicable when it comes to the use of force as well, thus enabling the practice of invited interventions.⁴⁸⁸

This approach would also appear to rely on the flexible outlook of the Charter, according to which the norms on use of force evolve when enough evidence suggests they should do so.⁴⁸⁹ With intervention by invitation, this evolution has not only been manifested in the actions and opinions of sovereign States, but also the decisions adopted by the most important UN organs.⁴⁹⁰ Thus, the exception argument can be described as entailing a process, during which intervention by invitation has resurged due to the sponsorship of the most prominent participants of the international community. Such an approach is unmistakably multifaceted, even unpleasant, which may be vital due to the realities of international law itself.

⁴⁸⁶ de Wet, 'Modern Practice of Intervention by Invitation', p. 980; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 860.

⁴⁸⁷ *International Law Commission's Draft Articles on State Responsibility*, Article 20; Tanca, *Foreign Armed Intervention*, pp. 13-16.

⁴⁸⁸ Tanca, *Foreign Armed Intervention*, pp. 17-19; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 860; Crawford, *International Law Commission's Articles*, pp. 163-165.

⁴⁸⁹ Franck, *Recourse to Force*, pp. 6-7.

⁴⁹⁰ *Nicaragua*, para. 246; *Definition of Aggression*, Article 3(e); *Mali*, SC Res. 2100, Preamble.

However, this multi-layered outlook seems problematic from the perspective of a lawyer, as it suggests that new exceptions to Article 2(4) may appear outside the Charter's perimeter if the policies of States demand it. Beyond the surface, then, lies the suggestion that the prohibition on the use of force by States, which should be the cornerstone of international law, may be challenged by constant practice that contradicts the established norms on the matter.⁴⁹¹ In addition, it has been noted that the persistent practice on invited interventions in the UN period appears to violate the international law codified in the Charter, which has led to certain scholars being wary about the concept's lawfulness altogether.⁴⁹²

In any event, the exception approach admits that the Charter's plan is not functioning properly, and that therefore there is a need to re-awaken other forms of armed force, ones that should have been made redundant with the adoption of the instrument. This argument hence lacks the clear-cut lines of the first claim on the lawfulness of intervention by invitation, given that instead it is based on the unpredictable currents of the global community. This type of argumentation requires venturing outside a lawyer's traditional toolkit of strict formalism and accepting a certain type of anarchy which affects the international community and the norms that govern it.⁴⁹³

However, such an excursion may be inevitable given the nature of the international legal system or the lack thereof.⁴⁹⁴ Whatever one's perspective on international law is, no one can convincingly argue that the discipline is a sturdy take on what law is supposed to be.⁴⁹⁵ The lack of proper central structures, hierarchies and effective enforcement measures are problems which only scratch the surface.⁴⁹⁶ Hence, despite the world's best efforts, international society is yet to achieve the status of a true community. Rather, it is an assembly of various actors with different and often contradicting goals, held together by the common values⁴⁹⁷ shared by all. Consequently, the international legal norms are of a unique nature. The exception approach to intervention by invitation is based on an

⁴⁹¹ This, incidentally, is a feature of the New Haven approach that is often criticised, see Chapter I, Section 2.2.2.

⁴⁹² Cassese, *International Law*, pp. 369-370.

⁴⁹³ Anthony Carty, 'Critical International Law: Recent Trends in the Theory of International Law' (1991) 2 *European Journal of International Law* 1, pp. 1-2.

⁴⁹⁴ *Ibid.*

⁴⁹⁵ Amerasinghe, 'International Law and the Concept of Law', p. 79; James C. Hsiung, *Anarchy and Order: the Interplay of Politics and Law in International Relations* (London, Lynne Ripener Publishers, 1997), p. 3.

⁴⁹⁶ Amerasinghe, 'International Law and the Concept of Law', p. 79; Scott, *International Law in World Politics*, pp. 6-9; Shelton, 'International Law and "Relative Normativity"', pp. 141-143; Hsiung, *Anarchy and Order*, p. 87.

⁴⁹⁷ See Chapter II, Section 2.2.2.

understanding of these circumstances and an admission that this does not present a good image of international law and the use of force.

Nevertheless, one major legal hurdle must still be cleared with the exception approach, and it concerns the legal dimensions of Article 2(4).⁴⁹⁸ As discussed earlier,⁴⁹⁹ the prohibition on the use of force is in part a rule of *ius cogens*, a peremptory norm which takes normative primacy in international law.⁵⁰⁰ Moreover, rules of *ius cogens* automatically bear the element of *erga omnes*, which means that they are rules owed towards all members of the international community.⁵⁰¹ In other words, any State is entitled to make claims about the breaches of these rules.⁵⁰² This poses a dilemma to intervention by invitation in particular: if any member of the international community holds interest in violations of the non-use of force, host State consent alone may not be enough to validate a military intervention.⁵⁰³

However, as discussed in Chapter II,⁵⁰⁴ the range of the peremptory dimension of the ban is smaller than its 'normal' limits. This means that only the gravest forms of armed force, such as hostile acquisition of territory or armed attacks, belong to the *ius cogens* and *erga omnes* aspects of the prohibition.⁵⁰⁵ As long as armed intervention is not used to reach such ends, host State consent precludes the wrongfulness of the use of force, making it a valid basis for intervention by invitation.⁵⁰⁶ Thus, the exception approach based in State responsibility is a plausible argument, even with the effect of the peremptory dimension of the ban on the use of force.

Overall, the exception approach may offer a more multi-faceted answer to the legality of intervention by invitation, but it takes a winding path to get there. Whether this is desirable is open to interpretation. For quite a few lawyers and those who prefer the approach detailed in Section 2.2 of this chapter, this fact is bound to be unappealing. However, for those who seek to explore international law beyond its superficial and often sugar-coated surface, this response to the lawfulness of intervention by invitation may appear more sustainable. This is because the approach is partially founded on the conflicting nature of international law, and thus requires deep understanding of the

⁴⁹⁸ Tanca, *Foreign Armed Intervention*, pp. 20-21.

⁴⁹⁹ See Chapter II, Section 1.2.3.

⁵⁰⁰ *Fragmentation of International Law*, para. 374; Vienna Convention on the Law of Treaties, Articles 53 and 64; Cassese, *International Law*, pp. 205-208.

⁵⁰¹ *Fragmentation of International Law*, para. 404; Tanca, *Foreign Armed Intervention*, p. 20.

⁵⁰² *Barcelona Traction Case*, paras. 33-34; *Case Concerning East Timor*, para. 29; Tanca, *Foreign Armed Intervention*, pp. 20-22.

⁵⁰³ Tanca, *Foreign Armed Intervention*, pp. 20-22.

⁵⁰⁴ Chapter II, Section 1.2.3. to be more specific.

⁵⁰⁵ Tanca, *Foreign Armed Intervention*, pp. 21-22; Hannikainen, *Peremptory Norms (Jus Cogens)*, pp. 349-356.

⁵⁰⁶ Tanca, *Foreign Armed Intervention*, pp. 21-22 and 46-47.

functioning of the global legal system. Instead of deriding intervention by invitation for being the product of such circumstances, it accepts them as an inevitable and acknowledges that the doctrine cannot be discarded solely because of this context.

2.4. Comparing the Two Responses: Which Prevails?

We have now inspected the two major responses to the lawfulness of intervention by invitation. Both outlooks have their pros and cons. The argument which holds that invited interventions were never banned by the UN Charter is seemingly straight-forward and bound to please regular lawyers.⁵⁰⁷ However, it does not attend to the fact that international law is no ordinary field of law, or the peculiarities of the use of force. The exception approach, although at first glance more complicated, considers these complexities and may thus offer more sustainable answers in the long run.

Accordingly, it is asserted that the exception approach provides the more solid explanation for the legality of intervention by invitation. This conclusion has been reached because the apparent clarity of claiming that the Charter never intended to ban invited interventions is riddled with issues. The argument is too focused upon the wording and scope of Article 2(4) alone,⁵⁰⁸ and thus fails to take into account the bigger scheme of the Charter.⁵⁰⁹ In addition, it is inevitably grounded on a more limited view on the scope of the prohibition, which has been rejected in past practice.⁵¹⁰ Moreover, relying on this type of argumentation presents only a superficial look into the functioning of the international community: it does not give enough consideration to the political contexts in which legal claims are formulated.

Conversely, the exception approach appears to be more multifaceted from the outset, yet it ultimately succeeds in creating a thorough legal explanation for intervention by invitation. When acknowledging that the doctrine has emerged as an exception to Article 2(4)⁵¹¹ courtesy of the regime of State responsibility,⁵¹² the approach is an acceptance of the widely championed flexibility of the Charter and its power to yield to changes when the situation in practice does not match that of legal regulation.⁵¹³ Moreover, this approach recognises that such changes are often brought forward by the most powerful

⁵⁰⁷ Wippman, 'Military Intervention', p. 210; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 860.

⁵⁰⁸ de Wet, 'Modern Practice of Intervention by Invitation', p. 980.

⁵⁰⁹ UN Charter, Preamble and Article 1(1).

⁵¹⁰ *Corfu Channel*, pp. 34-36; Brownlie, *International Law and the Use of Force*, pp. 267-268; Harris, *Cases and Materials*, pp. 865-866; Gray, *International Law and the Use of Force*, p. 32.

⁵¹¹ de Wet, 'Modern Practice of Intervention by Invitation', pp. 980 and 998.

⁵¹² Tanca, *Foreign Armed Intervention*, pp. 13-19.

⁵¹³ de Wet, 'Modern Practice of Intervention by Invitation', pp. 980 and 998; Franck, *Recourse to Force*, pp. 6-7; Gazzini, *Changing Rules*, pp. 1-2.

States in the international community, and that this was also definitely the case with intervention by invitation. Its appearance can be attributed to the failure of collective security at the hands of the Security Council's permanent members, which also took to staging unilateral armed interventions upon request as an alternative.⁵¹⁴ The argument does not endorse this premise as an ideal situation, but relents and accepts its presence due the inescapable nature of the international law, which allows some States to get away with their actions more easily than others.

Reaching this conclusion may seem unpleasant, as it reverts to the sphere of stone-cold realism by which international law is little more than a tool wielded by the most powerful. This should not bode well with many observers of the discipline. After all, such observers often have a clear bias towards global values.⁵¹⁵ They may hope to see international law emerge as a beacon of justice among endless wrongdoings, especially when the use of force is concerned.⁵¹⁶ Nevertheless, the finding follows the 'regular' lines of intervention, making it a measure exhausted by the most powerful, whereas the smaller countries stay inactive. This has been the *status quo* for as long as the concept of intervention itself has existed, as noted by the ICJ in the *Corfu Channel* case.⁵¹⁷ Concluding that this premise has also resulted in modern intervention by invitation is hence not surprising at all. Instead, it is a realistic, if not even a dejected resolution to an issue which affects the use of force by States on a larger scale as well.

Despite this conclusion, one last issue persists: the relevance of this finding. Intervention by invitation in its current incarnation has existed for decades, with little regard given to its justification. Those who exhaust the doctrine also appear to be least interested in formulating its exact legal basis. It is therefore pertinent to examine this situation more thoroughly to discover why such a setting has come about.

2.5. Of Intervention by Invitation and Its Fleeting Legal Justification

The conclusion of this section is that intervention by invitation of the UN era has emerged due to the failure to enact the Charter fully, which launched additional decision-making processes within the international community. The concept's success can in particular be attributed to the still-faltering position of collective security, which is yet to

⁵¹⁴ Hargrove, 'Intervention by Invitation', pp. 114-115; Mullerson, 'Intervention by Invitation', pp. 128-129; Wedgwood, 'Commentary on Intervention by Invitation', pp. 135-139; Gray, *International Law and the Use of Force*, p. 84; de Wet, 'Modern Practice of Intervention by Invitation', p. 998.

⁵¹⁵ Koskeniemi, *Politics of International Law*, pp. 271-272.

⁵¹⁶ See *inter alia* the UN Charter, Preamble.

⁵¹⁷ *Corfu Channel*, p. 35.

take its place in a manner laid down in the Charter.⁵¹⁸ Thus, intervention by invitation must be regarded as an exception to the prohibition on the use of force, rather than being a concept which was left untouched by the Charter's regulation on armed force.⁵¹⁹ At the same time, the global community has undeniably allowed the doctrine to function in practice with a hazy legal basis.⁵²⁰ This could be explained by simply arguing that since States have not been forced to offer an explanation on the matter, they have chosen to take the easy route and remain silent. Ending the deliberations with this conclusion would suggest that exploring the legal basis of invited interventions in more detail is a mere curiosity with little actual relevance.

Being satisfied with such a finding would be short-sighted and, quite frankly, very lazy. Instead, we should concentrate on asking more questions about this premise. Why is this the case with State responses to invited interventions? Would it not be beneficial to elaborate fully upon intervention by invitation, so that the confusions about its various aspects would disperse? After all, the aim of any given piece of legal regulation should be clarity, so that the subjects have a clear idea of what is legally allowable and what is not. This premise should be of importance for armed force, which has shaped the world as we know it.⁵²¹

However, based upon the practice of States, clearing confusion is not in their interests. In fact, the normative haziness and bendable limits of invited interventions are what makes the doctrine so alluring for States to exhaust, as they allow for much leeway. In other words, the mystery surrounding the justification of intervention by invitation is reflected in its scope in practice, keeping it not only very dynamic but also applicable in many different situations. Taking a stern stance on the doctrine's legal basis could impose too many restrictions on the future argumentation and application of invited interventions.

This finding does not mean that militarily-active States would endorse the consensual use of force becoming unlimited, for they have understood that the concept cannot be as legally unconstrained as collective security. If this were the case, even the most powerful could be in danger of unpredictable foreign armed interventions, a risk that they are capable of blocking when it comes to collective military measures.⁵²² However, retaining the possible flexibility of invited interventions remains on their agenda as well, meaning that silence has proved to be the best answer to questions concerning the lawfulness of intervention by invitation.

⁵¹⁸ de Wet, 'Modern Practice of Intervention by Invitation', p. 998.

⁵¹⁹ *Ibid.*, p. 980.

⁵²⁰ *Ibid.*; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 860.

⁵²¹ UN Charter, Preamble.

⁵²² *Ibid.*, Article 27(3).

As will be demonstrated later, States have often drastically changed their opinions on intervention by invitation and its boundaries in practice, sometimes to the point of pure hypocrisy.⁵²³ While such hypocrisy is not usually lost on international commentators, the often-confusing limits of invited interventions have allowed States to get away with such two-faced activities. The ambivalence concerning the doctrine's precise justification is what makes it so flexible in practice, which in turn caters to the needs of those who are willing to stage foreign armed interventions.⁵²⁴

In addition, the haziness surrounding intervention by invitation also influences other uses of force falling beyond the scope of the Charter. As this thesis will soon show, these propositions are yet to find success comparable to intervention by invitation. Rather, their lawfulness remains contested, keeping argumentation on the matter in a limbo. If the legal basis of intervention by invitation was well-defined with no room for debate, it would influence the conversation concerning the legal position of these other ventures.

And, as it has turned out, drawing clear lines on such argumentation may be an impossible task. For legal commentators this can be incredibly frustrating, but for States it allows some much-needed leeway to pursue their policies. For the militarily powerful, this is the attribute that makes intervention by invitation so particularly appealing. It is an unfortunate situation in many aspects, that much cannot be denied. Nevertheless, it also an immediate reflection of the global community that has been shaped over the centuries. Furthermore, intervention by invitation is not the lone wolf in this sense, since many international doctrines have been the results of similar developments. Unpredictability is the *status quo* of international law, and the norms on the use of force, including intervention by invitation, are no exceptions to this.⁵²⁵

One last remark needs to be made on the unattractive appearance of invited interventions. Whereas the UN regulation on the use of force was built upon ideals,⁵²⁶ the need to revive intervention by invitation has been based in stone-cold political realities.⁵²⁷ As such, when broken down to its basic components, the rebirth of the doctrine does not paint a pretty picture about the legal status of available armed measures or the States which resort to them. This has undoubtedly increased the desire of States to remain coy about the doctrine in general, its legal justification included. States have found it better to

⁵²³ Zachary Vermeer, 'The Jus Ad Bellum and the Airstrikes in Yemen: Double Standards for Decamping Presidents?', EJIL: *Talk!*, 30 April 2015, <www.ejiltalk.org/the-jus-ad-bellum-and-the-airstrikes-in-yemen-double-standards-for-decamping-presidents>.

⁵²⁴ Hargrove, 'Intervention by Invitation', pp. 120-122; Mullerson, 'Intervention by Invitation', pp. 128-129.

⁵²⁵ Gazzini, *Changing Rules*, pp. 1-2.

⁵²⁶ UN Charter, Preamble and Article 1(1).

⁵²⁷ Gray, *International Law and the Use of Force*, pp. 84-85.

apply liberal amounts of different coatings to the doctrine instead, so that the overall picture becomes more abstract and subject to interpretation.

Nonetheless, underneath the antagonistic coating lies a doctrine that has done its part in upholding order within the global community as well. In fact, the concept was reinvigorated to substitute for the faltering Charter during the Cold War. Thus, for all the apparent instability it has caused, intervention by invitation has also helped in sustaining the damage caused by the unravelling of the Charter's system, which has allowed the concept to build a tentative cooperation with the instrument's contents.

3. Intervention by Invitation and the Uses of Force Entailed in the UN Charter

3.1. Introduction

The current incarnation of invited interventions has not appeared in a streamlined manner. Instead, it has circumvented the UN system on the use of force and was forced to take a non-linear path in order to reach its goal of re-emerging as a legal doctrine. This suggests the concept does not sit comfortably with the initially planned regulation on armed force, at least by default.⁵²⁸ Indeed, this appears to be the case. One can discern that intervention by invitation directly opposes and challenges the regulation envisioned in the UN Charter,⁵²⁹ the core gist of which was collective security with little room for unilateral measures.⁵³⁰ The earlier finding explains this contradiction: intervention by invitation is a form of armed force reborn outside the context of the Charter and despite its initial restrictions on the use of force.⁵³¹ This means that intervention by invitation is a recognised exception to Article 2(4) of the Charter, one attributable to the regime of State responsibility,⁵³² rather than a matter meant to be uncovered by the ban on the use of force.⁵³³

Thus, intervention by invitation can be linked with the partial dissolution of the Charter's plan for the use of force.⁵³⁴ After the centralisation of armed force collapsed, the resulting shambles has enabled traditional forms to make appearances in the post-1945 era.⁵³⁵ In addition, the failure to implement fully collective security has had an inevitable effect on the one form of unilateral armed force allowed by the Charter: self-defence.⁵³⁶ After all, self-defence should only be allowable until the Security Council decides to act.⁵³⁷ Given this non-implementation, one can question how self-defence functions in current international law. Such questions are not without merit, as practice has shown that the letter of the Charter is certainly not how the scheme currently works.⁵³⁸ This means that the instrument remains in a slight state of disarray, which inevitably affects intervention by invitation as well.

⁵²⁸ Cassese, *International Law*, pp. 369-370.

⁵²⁹ *Ibid.*

⁵³⁰ UN Charter, Preamble and Articles 1(1), 2(4), 24, 39, 41-42, 51 and 53.

⁵³¹ de Wet, 'Modern Practice of Intervention by Invitation', pp. 980 and 998.

⁵³² Tanca, *Foreign Armed Intervention*, pp. 13-19.

⁵³³ de Wet, 'Modern Practice of Intervention by Invitation', pp. 980 and 998; Fox, 'Intervention by Invitation', pp. 816 and 818-819.

⁵³⁴ de Wet, 'Modern Practice of Intervention by Invitation', p. 998.

⁵³⁵ *Ibid.*

⁵³⁶ Gazzini, *Changing Rules*, p. 127.

⁵³⁷ UN Charter, Article 51.

⁵³⁸ Franck, *Recourse to Force*, p. 21; Gray, *International Law and the Use of Force*, pp. 124-125.

Hence, examining the relationship intervention by invitation has with both collective security and self-defence is pertinent: the doctrine has re-emerged due to the evolution and mishaps of the Charter's system, and hence its future position will depend on these two concepts as well. This examination, while focusing on the UN era, will also observe the concepts before 1945 to fully discover their historical correlation. Although the connections of intervention by invitation and the two uses of force allowed by the Charter will be observed separately, the final conclusions on the matter will offer general findings on how all three concepts connect with one another.

3.2. The Winding Road of Collective Security and Its Implications on Intervention by Invitation

No doctrine is an island in international law. The rules often overlap, entwine and unravel in quickly-shifting patterns, which makes any international legal concept privy to various influences and even perplexing changes. Armed intervention by invitation is no different, which its practice never fails to exemplify. While consensual use of force dates to the pre-UN era, its relationship with the Charter's system has been shrouded in doubt as its convoluted legal basis so amply showcases.⁵³⁹ However, given that it is an applicable form of armed force, intervention by invitation must have such a relationship, strenuous though it may be, with the uses of force explicitly entailed in the Charter.

The doctrine's connection to collective security is particularly perplexing, as history shows us that the two concepts are in fact interrelated. This relationship can be traced back to the birth of intervention as measure exhausted by sovereign States, marking a centuries-long connection.⁵⁴⁰ It could even be argued that the concepts are mirror images of each other, and that consequently their respective evolutions will always bear mutual reflections. Hence, comparing these two concepts is important if one wishes to determine the future legal position of intervention by invitation: is it merely a bandage used well past its expiration date to make up for the shortcomings of the Charter's scheme? Or does it have long-standing potential beyond this premise, which could allow it to exist should the initial plan on armed force come closer to fruition?

We should begin this examination in eras which preceded that of the Charter. This takes us to the 1700s and 1800s, which are largely regarded as the centuries during which

⁵³⁹ Cassese, *International Law*, pp. 369-370; de Wet, 'Modern Practice of Intervention by Invitation', p. 980; Nolte, 'Intervention by Invitation', *The Max Planck Encyclopedia*, January 2010, paras. 2 and 14.

⁵⁴⁰ Cassese, *International Law*, pp. 29-30; Nolte, 'Intervention by Invitation', *The Max Planck Encyclopedia*, January 2010, para. 2; Chesterman, *Just War or Just Peace*, pp. 22-23; Thakur, 'Reconfiguring the UN System', p. 180.

the concept of armed intervention first emerged in full.⁵⁴¹ During this time, the aspirations of different nation-States were beginning to impact the formation of Europe, and existing international borders were constantly threatened due to a range of wars.⁵⁴² In addition to external threats, those centuries also saw the rise of internal rebellions which resulted in various regime challenges across the old continent, the French Revolution and the subsequent regime of Napoleon Bonaparte being a famous example.⁵⁴³ Such uncertainties did not sit well with the leaders of many powerful countries, who then took to seeking means with which they could better ensure their security.⁵⁴⁴

One of the outcomes was the Holy Alliance, established by Austria, Prussia and Russia in 1815.⁵⁴⁵ The Alliance *inter alia* entailed security guarantees between the contracting States, and thus allowed parties of the Alliance to intervene militarily if another signatory to the treaty was in duress.⁵⁴⁶ This proved to be a fundamental development both during its time and beyond. During its functioning, the objectives of the Holy Alliance were echoed in other European coalitions, such as the Quadruple Alliance (1815) and subsequently the Quintuple Alliance (1818), and in bilateral treaties between the biggest monarchies of the continent.⁵⁴⁷ In retrospect, the Holy Alliance and its counterparts have been regarded perhaps most prominently as one of the first instances of collective security, in particular since their establishment was partly inspired by the will to maintain balance and stability in Europe following the conquest-rich regime of Napoleon.⁵⁴⁸

However, the treaty had multiple elements which can also be attributed to intervention by invitation.⁵⁴⁹ One such qualification was another partial goal of forming an alliance with other countries: controlling the possible internal unrest developing in the contracting States.⁵⁵⁰ Internal unrest has been the usual context for inviting a foreign armed

⁵⁴¹ Cassese, *International Law*, pp. 29-30.

⁵⁴² Brownlie, *International Law and the Use of Force*, p. 19; Thakur, 'Reconfiguring the UN System', p. 180.

⁵⁴³ Cassese, *International Law*, p. 28.

⁵⁴⁴ Brownlie, *International Law and the Use of Force*, p. 19.

⁵⁴⁵ *Ibid.*; Cassese, *International Law*, p. 29; Nolte, 'Intervention by Invitation', *The Max Planck Encyclopedia*, January 2010, para. 2.

⁵⁴⁶ Cassese, *International Law*, pp. 29-30.

⁵⁴⁷ *Inter alia* the Treaty of Alliance and Friendship, Great Britain and Austria, Article 3.

⁵⁴⁸ Thakur, 'Reconfiguring the UN System', p. 180; Cassese, *International Law*, pp. 28-29; Glennon, *Limits of War*, p. 13.

⁵⁴⁹ Georg Nolte, 'The Resolution of the *Institut de Droit International* on Military Assistance on Request' (2012) 45 *Revue Belge de Droit International* 241, p. 241; Nolte, 'Intervention by Invitation', *The Max Planck Encyclopedia*, January 2010, para. 2.

⁵⁵⁰ Igor I. Lukashuk, 'The United Nations and Illegitimate Regimes: When to Intervene to Protect Human Rights' in Lori Fisler Damrosch and David J. Scheffer (eds), *Law and Force in the New International Order* (Boulder, Westview Press, 1991), p. 143; Chesterman, *Just War or Just Peace*, p. 23.

intervention, whereas the notion of collective security has first and foremost appeared to combat external threats via the use of security guarantees.⁵⁵¹ Thus, given that it obeyed the aims of maintaining internal order, one can appreciate that the movement facilitated by the Holy Alliance served objectives often linked to invited interventions.

When compared to modern collective security, one also ought to note that the treaty was composed of few States, the Great Powers at the time, rather than the international community in a wider sense.⁵⁵² This is naturally a qualification that is partly present in modern collective security as well: after all, select States hold much better cards in their hands when compared to the vast majority. However, collective security as we understand it today at least purports to be a system which preserves peace on a global scale and in a manner that benefits the international community.⁵⁵³

It thus appears that the first appearances of intervention by invitation and collective security were interlinked, at least to a certain extent. Nevertheless, tracing the doctrines' connection during the inter-War era of the 1900s presents a bigger challenge. This can be attributed to several factors. This era only lasted 20 years, from the formal conclusion of World War I in 1919 to the commencement of the second in 1939. This only provides a short span of time and few major legal instruments, albeit including the Pact of Paris and the League of Nations Covenant, for evaluation. For these reasons, even the general scope of the norms purporting to limit the use of force was left unclear.⁵⁵⁴ Still, this did not stop the use of unilateral interventions in particular internal armed conflicts, including the Spanish Civil War.⁵⁵⁵ Collective security, however, never really came to be outside the tentative hopes within the framework of the League of Nations.⁵⁵⁶ Hence, the concepts never had a chance to establish a relationship of either conflicting or cooperative nature. All in all, the duration of the inter-War period did not prove long enough to offer fertile ground for inspecting the correlation between invited interventions and collective security.

Of course, the UN era provides much bigger points of fascination. Although the League of Nations merely suggested the concept, the United Nations chose to make the

⁵⁵¹ Liebllich, 'Intervention and Consent', p. 339; Thakur, 'Reconfiguring the UN System', p. 180.

⁵⁵² Cassese, *International Law*, pp. 29-30; Crawford and Nicholson, 'The Relevance of Established Rules and Institutions', p. 108.

⁵⁵³ UN Charter, Preamble and Articles 1(1) and 24; Franck, *Recourse to Force*, pp. 21-24.

⁵⁵⁴ See Chapter II, Section 1.1. for further details.

⁵⁵⁵ Fox, 'Intervention by Invitation', p. 823; Van Wynen Thomas and Thomas, 'International Legal Aspects of the Civil War in Spain', pp. 141 and 153-154.

⁵⁵⁶ Jean D'Aspremont, 'The Collective Security System and the Enforcement of International Law', in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, Oxford, 2015), pp. 139-140; Thakur, 'Reconfiguring the UN System', p. 181.

implementation of collective security into one of its main pillars.⁵⁵⁷ This meant limiting unilateral uses of force in favour of a system of collective use of force, applied at the discretion of the Security Council, whose decisions would be put into practice by an army under the direct command chain of the UN itself.⁵⁵⁸ Invited interventions appeared to have no place in this context, an assumption which soon turned out to be quite false. Both a functioning Security Council and armed forces under UN control were soon exiled to exist in theory only,⁵⁵⁹ which has allowed intervention by invitation to reclaim a place in legal argumentation, in an effort to bridge this gap.⁵⁶⁰

Thus, the connection between the concepts was vital during the re-emergence of invited interventions in the Cold War and beyond. Ever since realising that collective security under the United Nations would remain in the realm of theory, the practice has called for the return of intervention by invitation.⁵⁶¹ Furthermore, the re-emergence was initiated by the same atmosphere, and individual States, that had stalled the implementation of the UN system for centralised armed force.⁵⁶² One might even claim that the grounds for intervention by invitation were laid by the same States which then took to re-enforcing the doctrine in practice. Of course, certain other elements have been in play as well, and they have paved the way for the return of invited interventions. Perhaps the most important of these elements was the rising number of internal conflicts over international ones.⁵⁶³ Since the UN was born out of the carnage of the Second World War, the organisation was built with the specific target of preventing such inter-State conflicts from ever rising again.⁵⁶⁴ The increased number of internal conflicts was thus not fully anticipated by the drafters of the Charter.⁵⁶⁵ This brought forth a vacuum in both the legal and practical sense, one which further fuelled the return of intervention by invitation.

This development concerning the lack of Security Council activity and internal strife also served the purposes of the Cold War itself. The superpowers of the time were adamantly avoiding direct conflict with one another in accordance with the power balance, but still wished to assert their influence in geopolitically important locations,

⁵⁵⁷ UN Charter, Preamble and Articles 24, 39 and 41-43.

⁵⁵⁸ *Ibid.*, Articles 1(1), 2(4), 24, 39 and 41-43.

⁵⁵⁹ Franck, *Recourse to Force*, pp. 21 and 24.

⁵⁶⁰ de Wet, 'Modern Practice of Intervention by Invitation', p. 998.

⁵⁶¹ *Ibid.*

⁵⁶² Hargrove, 'Intervention by Invitation', pp. 114-115 and 119; Mullerson, 'Intervention by Invitation', pp. 128-129; Wedgwood, 'Commentary on Intervention by Invitation', pp. 135-139.

⁵⁶³ Gray, *International Law and the Use of Force*, pp. 67; Franck, *Recourse to Force*, pp. 40-41.

⁵⁶⁴ UN Charter, Preamble.

⁵⁶⁵ Franck, *Recourse to Force*, pp. 40-41.

even at the apparent cost of common values.⁵⁶⁶ Civil unrest and even full-scale non-international armed conflicts provided fertile ground for this goal.⁵⁶⁷ On such occasions, the powerful States were able to execute their foreign policies by attaining and helping allied governments across the globe, all the while preventing their mutual tension from developing into a direct conflict.⁵⁶⁸

However, would intervention by invitation have proved so useful had collective security been even remotely successful from the outset? Where, if anywhere, would intervention by invitation have fallen in such a case? Answering these questions is not easy, as imagining a post-1945 international community with a clearly functioning collective security is difficult: so magnificently has the system envisioned in the San Francisco conference stumbled. Still, if collective security had been at least present in the years that followed 1945, in one form or another, would intervention by invitation have been able to reappear as it did?

It is difficult to see how invited interventions could have gained their current position if collective security had found moderate success following the adoption of the UN Charter. Even without the implementation of the system in its fullest extent, just the plausible presence of collective security in practice would have had an immediate effect on the emergence of intervention by invitation. After all, as the crown jewel of the Charter's plan, collective security would have held primacy,⁵⁶⁹ forcing invited interventions to fall back in the case of a collision.

Moreover, part of the acceptance that invited interventions gained during the Cold War stemmed from recognising the facts: international politics was deeply polarised, meaning that all hopes of collective measures should be left waiting in the wings while the superpowers flexed their muscles on stage.⁵⁷⁰ In other words, the mere presence of Cold War politics neutralised collective security, as the two could not function in conjunction. Conversely, the reintroduction of intervention by invitation was necessary due their incompatibility, meaning that it is a direct result of the era's political circumstances. The lack of such circumstances would have impacted both intervention by invitation and collective security, which would have made their positions quite different from what they are today.

However, these observations do not mean that the emergence of invited interventions would have been utterly doomed even with the presence of collective security. In fact, the

⁵⁶⁶ Hargrove, 'Intervention by Invitation', pp. 115 and 119; Wedgwood, 'Commentary on Intervention by Invitation', p. 137.

⁵⁶⁷ Gray, *International Law and the Use of Force*, pp. 84-85.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ UN Charter, Articles 1(1), 24-25 and 103.

⁵⁷⁰ Hargrove, 'Intervention by Invitation', pp. 114-115.

way collective security currently relies on consensual use of force suggests that the doctrines do not necessarily contradict one other in practice. Moreover, even today collective use of force is deployed by coalitions of the willing instead of an actual UN army, suggesting that its collectivity is not completely such. Collective security thus appears to be aligning with invited interventions to an extent, which highlights their continuing relationship.⁵⁷¹

3.3. Self-Defence and Intervention by Invitation: What Is the Difference?

We cannot limit the analysis in this section to the sphere of collective security, as the relationship between intervention by invitation and self-defence contains many interesting factors as well. This connection is more complex and important than the first glance might suggest. As keen observers of international law know, the concept of self-defence has undergone many changes since 1945, making the doctrine vastly different from what was initially envisioned by those who drafted the Charter.⁵⁷² Although self-defence should be used sparingly and only in the absence of Security Council action,⁵⁷³ the concept has arguably widened its scope from what is detailed in the Charter.⁵⁷⁴

Given this rapid development, one might wonder if and how self-defence has affected modern invited interventions. In fact, a quick glance at State practice shows that the two concepts appear to have been invoked side by side, to point where it may be difficult to distinguish one from another.⁵⁷⁵ This does not necessarily mean anything major: after all, applying the entire spectrum of arguments to justify armed interventions is quite common. This is pure strategy, as invoking the full radius of claims ensured that at least one of them could find success. Still, a certain connection between self-defence and intervention by invitation does exist, and it can be traced back to the beginning of the United Nations.

Still, this link has not been one of pure co-application, due to the legal spectrum of self-defence. Unlike intervention by invitation, self-defence has a well-codified position in current international law as a unilateral exception to the ban entailed in Article 2(4), as well as existing in the sphere of customary international law.⁵⁷⁶ Thus, although the ban on the use of force was intended to be strict, it always left room for armed measures which States may exhaust when their sovereignty and even core existence are threatened by

⁵⁷¹ For more nuanced arguments, see Chapter V, Section 2.1.

⁵⁷² Gazzini, *Changing Rules*, pp. 131-132 and 180-183.

⁵⁷³ UN Charter, Preamble and Articles 1(1), 2(4) and 51.

⁵⁷⁴ This is well exemplified by the debate on whether self-defence is an allowable response to international terrorist attacks, see Gray, *International Law and the Use of Force*, pp. 198-202.

⁵⁷⁵ Gray, *International Law and the Use of Force*, pp. 168-169; Henderson, 'Editorial Comment', pp. 210-211.

⁵⁷⁶ UN Charter, Article 51; *Nicaragua*, para. 176.

various external threats.⁵⁷⁷ Hence, when a State is subjected to an armed attack, it may revert to the use of force in self-defence to repel the attack.⁵⁷⁸ Although this provision was drafted with inter-State relations in mind, it can now also be pertinent when a State is attacked by a terrorist organisation.⁵⁷⁹

As expected in the context of the Charter's vision, the right to self-defence is not limitless. Use of force based on this principle must be proportionate to the armed attack the State has suffered, and also be necessary in order to counter it.⁵⁸⁰ Furthermore, self-defence must be applied within a proper time limit once the attack has first occurred: in other words, the concept ought to be enacted with the element of immediacy.⁵⁸¹ Finally, any armed activities undertaken under self-defence must be aimed at militarily-important targets,⁵⁸² be reported to the Security Council, and cease when the organ decides to act on the matter.⁵⁸³

As long as these requirements are met, the victim State can both apply armed force itself and also ask other States for similar measures: this notion is known as collective self-defence.⁵⁸⁴ Hence, when a State is subjected to an armed attack, it may lawfully request others to assist it in its application of self-defence. Measures allowed by collective self-defence include the use of force on the victim State's territory, if necessary. Hence, if the host State asks for foreign military measures to be deployed on its territory due to circumstances described in Article 51 of the Charter, the concept of intervention by invitation would be eclipsed by collective self-defence.⁵⁸⁵ In other words, the matter would solely belong to the legal perimeters allowed by the concept of self-defence, not intervention upon request.

However, the general evolution of the use of force — particularly that concerning measures against terrorist threats — might force the concepts to operate alongside one

⁵⁷⁷ UN Charter, Articles 2(4) and 51.

⁵⁷⁸ *Ibid.*, Article 51.

⁵⁷⁹ Gray, *International Law and the Use of Force*, pp. 198-199.

⁵⁸⁰ *Ibid.*, p. 148; *Nicaragua*, para. 176; *Oil Platforms*, para. 51; 'Correspondence Between Great Britain and The United States, Respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat *Caroline* — March, April, 1841' (1840-1841) 29 *British and Foreign State Papers* 1126, pp. 1127, 1129, 1133, and 1138; Harris, *Cases and Materials*, p. 896.

⁵⁸¹ Gray, *International Law and the Use of Force*, p. 149; Gazzini, *Changing Rules*, pp. 143-146.

⁵⁸² *Oil Platforms*, para. 51.

⁵⁸³ UN Charter, Article 51; *Nicaragua*, para. 200.

⁵⁸⁴ Gray, *International Law and the Use of Force*, p. 167; Paolo Palchetti, 'Consequences for Third States as a Result of an Unlawful Use of Force', in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, Oxford, 2015), p. 1225.

⁵⁸⁵ Brownlie, *International Law and the Use of Force*, pp. 327.

another, which will distort this previously-held premise.⁵⁸⁶ As armed force is no longer strictly applied between States, actions pursued against terrorist organisations which have committed armed attacks are now allowable under international law, certain conditions permitting.⁵⁸⁷ However, the way some States have exhausted this extension of self-defence seems to contradict its legal limits. For instance, the continuous targeted killings and other counter-terrorism operations by the United States seem to lack the element of immediacy, at least in the traditional sense.⁵⁸⁸ In such situations the doctrine of intervention by invitation could be needed as a separate doctrine to bridge the legal gap; this issue will be elaborated in Chapter V.

In addition, once again we must turn to the fading line between internal and international conflicts, which has made separating the two doctrines even more difficult.⁵⁸⁹ For instance, a seemingly internal rebel faction may factually be militarily supported by a third State: according to the *Nicaragua* case (1986), such support to the opposition is not allowed under international law, as it violates the principles of non-use of force and non-intervention.⁵⁹⁰ However, it has previously been held that if the government was ousted by rebels aided by other States,⁵⁹¹ said government could still invite a foreign intervention to reinstate its position.⁵⁹² Assuming that this premise is still applicable and combining it with the internationalisation of internal conflicts, would inviting such a foreign intervention be considered collective self-defence? Or would it simply be intervention by invitation, albeit in response to the use of force by another State?

Generally, the gravity of the use of force by the third State is the determining factor for this issue. As long as the use of force can be categorised as an armed attack, the measures pursued in response, either unilateral or collective, fit under the notion of self-

⁵⁸⁶ Claus Kreb, 'The Fine Line Between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force against "IS" is Syria', *Just Security*, 17 February 2015, <www.justsecurity.org/20118/claus-kreb-force-isil-syria>.

⁵⁸⁷ Gazzini, *Changing Rules*, pp. 180-183; Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law* (Fourth Edition, Oxford, Oxford University Press, 2003), p. 568, pp. 539-544.

⁵⁸⁸ Association of the Bar of the City of New York (International Law Committee), 'The Legality under International Law of Targeted Killings by Drones Launched by the United States', Report, June 2014, <www2.nycbar.org/pdf/report/uploads/20072625-TheLegalityofTargetedInternationalKillingsbyUS-LaunchedDrones.pdf>, pp. 49-50, 90, 92 and 94.

⁵⁸⁹ Gray, *International Law and the Use of Force*, pp. 168-169.

⁵⁹⁰ *Nicaragua*, paras. 206-207 and 246-247.

⁵⁹¹ Such activities are by default considered unlawful, see *Nicaragua*, para. 246.

⁵⁹² Gray, *International Law and the Use of Force*, pp. 81 and 92; Brownlie, *International Law and the Use of Force*, p. 327.

defence.⁵⁹³ However, as established in *Nicaragua*, militarily supporting rebels — while amounting to the use of force — has not traditionally been considered to be an armed attack.⁵⁹⁴ Instead, for the threshold of an armed attack to be crossed, the intervenor's own armed forces, or groups acting on its behalf, must be sent to another State's territory.⁵⁹⁵ Hence, if the intervenor does not use force directly, collective self-defence cannot by default be enacted,⁵⁹⁶ which makes intervention by invitation the only option between the two.⁵⁹⁷

It can be questioned if this position has shifted to accommodate the changes in modern warfare, which, by championing more surgical operations and the use of modern technology, has distanced possible intervenors even further away from the battlefields. Still, given the current confusion on the matter, it is safer to assume that the standards established in *Nicaragua* continue to stay in effect, meaning that direct military measures are still required for a third State to have committed an armed attack. What can be more difficult is establishing when an armed activity by a third State becomes a direct one, particularly with the evolving standards on State responsibility and *de facto* groups.⁵⁹⁸

In any event, one can see that the changing circumstances concerning the use of force have repainted the lines between its acceptable unilateral forms. Thus, it may now be more difficult to decipher when host State invitation denotes consensual use of force or self-defence. The modified, more muddled distinctions have come into play in various modern military interventions, most notably when combatting international terrorism around the globe.⁵⁹⁹ It goes on to show that akin to collective security, self-defence as a concept has been able to broker peace with intervention by invitation, making their co-application possible.

3.4. Final Remarks on the Relation

The modern version of armed intervention by invitation has reappeared due to the partial failure of the Charter's system, but the doctrine has still been able to find some common ground with both collective security and self-defence. This development can be based on the evolution of the concepts over the UN era and even beyond. As the reality of international relations has set in, the forms of armed force described in the Charter have undergone major changes from those presented in San Francisco in 1945. Collective

⁵⁹³ UN Charter, Article 51; *Nicaragua*, para. 211.

⁵⁹⁴ *Nicaragua*, paras. 246-247.

⁵⁹⁵ *Ibid.*, para. 195.

⁵⁹⁶ *Ibid.* paras. 247-249.

⁵⁹⁷ That is, as long as the invited intervention stays on the host State's territory.

⁵⁹⁸ See Chapter V, Section 5.

⁵⁹⁹ This matter will be elaborated on in Chapter V, Section 2.2.

security has been forced to yield its globalist position, resulting in the concept emulating certain elements of unilateral armed measures. Self-defence, however, has been subjected to a change which has appeared to widen the concept's boundaries. Moreover, both concepts have begun to thread the needle in relation to internal crises, which puts them directly in the same sphere of application as intervention by invitation.⁶⁰⁰

The concepts have managed to strike a delicate balance, but the relation between them in the future remains reliant on a range of factors. Much depends on which course collective security will take, and if widening of self-defence to apply to international terrorism will persist in the decades to come. If these developments take unexpected turns, as they often do in international law, the relationship between the Charter's provisions and intervention by invitation could become more strained, perhaps even conflicted. Still, for now the concepts appear to be at relative peace with one another, showcasing that the process on intervention by invitation has managed accommodate the Charter's needs as well.

⁶⁰⁰ Gray, *International Law and the Use of Force*, p. 113; Franck, *Recourse to Force*, pp. 40-41.

4. Invitation by Invitation and Other Controversial Forms of Armed Force

4.1. Other Armed Interventions Beyond the Scope of the UN Charter

Intervention by invitation is peculiar in many ways. In fact, it is a type of armed intervention that is not completely comparable to any other armed measure. Its relationship with the UN Charter remains strained, but at the same time its legal validity is widely accepted.⁶⁰¹ Hence, it is a doctrine which lies beyond the scope of the Charter itself, which means that it cannot be lumped together with the concepts of self-defence and collective security. However, the doctrine also cannot fully be categorised with other justifications that impugn the Charter, including the protection of nationals abroad and unilateral humanitarian intervention, because the reasoning behind these ventures have faced significant opposition. This has left their legal position as undecided at best, and at worst steadfastly rejected.⁶⁰²

Hence, this portion will delve deeper into the uses of force outside the context of the Charter, to analyse why certain forms have been allowed to exist in the legal sphere, when others have been exiled to political rhetoric. This dissonance will be the focus of the analysis, which will uncover how intervention by invitation has steadily managed to secure its position, whereas the other ventures face much more opposition. Furthermore, the section will explain why invited interventions have been allowed to remain so hazy, while simultaneously so much is demanded of other ventures which wish to crystallise into applicable legal norms.

After all, the premise for all of these propositions is the same. They must circumvent the Charter's prohibition and establish that a derogation has emerged which allows for their application. This means clearing the hurdles from not only the Charter and customary international law, but also the *ius cogens* aspect of the prohibition on the use of force. Thus far, only intervention by invitation has succeeded in this, which is an enigma in itself.

⁶⁰¹ Cassese, *International Law*, pp. 369-370; de Wet, 'Modern Practice of Intervention by Invitation', p. 980; *Nicaragua*, para. 246; *Definition of Aggression*, Article 3(e); *Mali*, SC Res. 2100, Preamble.

⁶⁰² Tanca, *Foreign Armed Intervention*, pp. 111-125; Gazzini, *Changing Rules*, pp. 170-179; Gray, *International Law and the Use of Force*, pp. 33-35, 52, 61 and 65-66; Franck, *Recourse to Force*, p. 109-112 and 135.

4.2. How Have the Other Ventures Fared in Comparison to Invited Interventions?

As noted above, in addition to consensual use of force, various attempts have challenged the scheme invented by the Charter. However, the exact responses to these arguments vary, meaning that their connections to intervention by invitation should be examined separately. The need for this is reflected in the outline of this section, which maps out the major arguments which have aimed to modify the regulation on the use of force. Nevertheless, the examination on intervention by invitation and other uses of force will be closed with general observations. In addition, the closing remarks will seek to explain why intervention by invitation has been able to gather support within the international community, whereas other controversial ventures have met much frostier responses.

4.2.1. Unilateral Humanitarian Intervention

Of the ventures on use of force which fall beyond the Charter, the idea of unilateral humanitarian intervention has arguably been the most controversial and polarising.⁶⁰³ Any conversation on the topic is bound to get heated, and often in a manner that does not endorse the strengths of legal argumentation. In recent decades, there have been numerous attempts by certain States and other actors to endorse the adoption of this type of a legal standard.⁶⁰⁴ The responses have varied from negative to mixed, leaving the concept in an undefined place, at least in the current atmosphere.⁶⁰⁵

The main concept of humanitarian intervention can be traced back to the 1700s and 1800s, much like invited interventions and collective security. Given that the name of the idea includes the term ‘intervention’, this should not be too shocking. During this time, many conflicts and periods of unrest saw the use of more morally based argumentation, begging for armed intervention for humanitarian purposes.⁶⁰⁶ The roots of humanitarian intervention can therefore be placed in same bundle which saw the first appearance of both intervention by invitation and collective security. Since this is the case, why has humanitarian intervention fared so poorly, whereas invited interventions and collective security have generally held their place, despite notable difficulties?

⁶⁰³ Franck, *Recourse to Force*, pp. 138; Spencer Zifcak, ‘The Responsibility to Protect’, in Malcolm D. Evans (ed), *International Law* (Third Edition, Oxford University Press, New York, 2010), pp. 505-507.

⁶⁰⁴ Hakapää, *Uusi kansainvälinen oikeus*, pp. 517-521; Gray, *International Law and the Use of Force*, pp. 34-35.

⁶⁰⁵ Gazzini, *Changing Rules*, p. 175; Gray, *International Law and the Use of Force*, pp. 34-35.

⁶⁰⁶ Chesterman, *Just War or Just Peace*, pp. 24-25 and 28-35.

The answer may lie with the reasoning behind humanitarian intervention, which tends to be more focused on argumentation that cannot exactly be labelled as legal. As the concept's name already suggests, the claims in its favour have focused on humanitarian matters rather than the perimeter of the ban on armed force.⁶⁰⁷ This is problematic given the *status quo*, the supposedly robust legal limitations imposed by the UN Charter,⁶⁰⁸ that unilateral humanitarian intervention should be challenging instead. In recent decades, for instance, the humane questions behind the doctrine have become one of the most controversial topics among legal discussions,⁶⁰⁹ which has caused the concept to drift away from the radius of invited interventions. Many of the claims behind the applicability of humanitarian intervention have been laced with the notions of ethics and morals, something which the carefully calculated and often technical intervention by invitation has generally avoided.

The moral flourish of humanitarian intervention has faced notable resistance among international observers, who have felt that its good intentions may actually be paving the road to hell.⁶¹⁰ In fact, the term 'humanitarian intervention' has become so unappealing that the newest venture aimed at allowing armed intervention to prevent catastrophes has dropped the name altogether.⁶¹¹ The focus has now moved to 'Responsibility to Protect' (R2P), a budding doctrine of which what was formerly known as humanitarian intervention forms only one part.⁶¹² R2P consists of three 'pillars', with only the third pillar concerning the option of using armed force, as the last resort, to protect people in great need.⁶¹³ Notably, R2P first and foremost attempts to establish a framework for collective armed measures: the project only refers to unilateral armed interventions in a

⁶⁰⁷ See *inter alia* President Barack Obama's justification for the plan to use force in Syria in the autumn of 2013, Office of the Press Secretary, 'Remarks by the President in Address to the Nation on Syria', The White House, 10 September 2013, <www.obamawhitehouse.archives.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>.

⁶⁰⁸ UN Charter, Article 2(4); Franck, *Recourse to Force*, p. 136.

⁶⁰⁹ Franck, *Recourse to Force*, pp. 135-139.

⁶¹⁰ *Ibid.*, p. 138; Pekka Niemelä, *The Politics of Responsibility to Protect: Problems and Prospects* (The Erik Castrén Research Reports 25/2008), pp. 20-21.

⁶¹¹ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa, International Development Research Centre for ICISS, 2001), p. 11; Thakur, 'Reconfiguring the UN System', p. 195; Zifcak, 'The Responsibility to Protect', pp. 510-511.

⁶¹² *2005 World Summit Outcome*, GA Res. 60/1, 24 October 2005, A/RES/60/1, paras. 138-139; Pekka Niemelä, *The Politics of Responsibility to Protect*, pp. 5-16; Christine Gray, 'The Use of Force and the International Legal Order in International Law' in Malcolm D. Evans (ed), *International Law* (Third Edition, New York, Oxford University Press, 2010), p. 623.

⁶¹³ *2005 World Summit Outcome*, para. 139.

stage whisper, leading it to shy away from directly advocating the adoption of such a legal doctrine.⁶¹⁴

Thus, it would appear that in the best-case scenario, R2P has managed to promote the authorisation of collective armed measures for humanitarian purposes. Still, this is a proposition which the Charter (which gives the Security Council practically unfettered discretion when it comes to determining threats or violations of international peace) already allows, meaning that few new legal developments have taken place.⁶¹⁵ Although R2P has generally fared better than the earlier project of humanitarian intervention, the matter of using unilateral force for humanitarian purposes has faced, at best, an unenthusiastic response.⁶¹⁶ As any aspiring form of armed force must show that it has managed to circumvent the prohibition in Article 2(4), it must be concluded that unilateral armed interventions for humanitarian reasons remain unlawful under international law.

Given that unilateral humanitarian intervention has been controversial in practically all its aspects, the argument has been used sparingly in the international community. As such, it has had few chances to ever come into contact with intervention by invitation, meaning that the two concepts have not been invoked in instantaneous manner. The scenario which comes closest is the on-going Ukrainian crisis, during which Russia has invoked a wide spectrum of arguments, from explicit intervention by invitation to even a tentative cry for measures due to humanitarian needs.⁶¹⁷ The reason for the lack of co-application is not only the rarity of humanitarian intervention as an actual argument, but also a fundamental incompatibility. The need for humanitarian intervention often arises from either a territorial State's failure to protect its people properly or even said State taking proactive illegal measures itself.⁶¹⁸ Intervention by invitation, however, is based on the consent of the host State,⁶¹⁹ which means that bringing these concepts together in the form of co-application can be difficult.

⁶¹⁴ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, pp. 15-16 and 49-50.

⁶¹⁵ UN Charter, Articles 24 and 39; Gazzini, *Changing Rules*, pp. 174-175.

⁶¹⁶ Thakur, 'Reconfiguring the UN System', p. 195; Zifcak, 'The Responsibility to Protect', p. 524.

⁶¹⁷ Corten, 'Russian Intervention', pp. 19-20; Marc Weller, 'Analysis: Why Russia's Crimea Move Fails Legal Test', *BBC News*, 7 March 2014, <www.bbc.com/news/world-europe-26481423>.

⁶¹⁸ Franck, *Recourse to Force*, p. 135.

⁶¹⁹ de Wet, 'Modern Practice of Intervention by Invitation', p. 980; Crawford, *Brownlie's Principles*, p. 769.

4.2.2. The Protection of Nationals Abroad

Asserting that a State may lawfully use force in another country when its nationals are threatened is a legal argument that bears many peculiarities. First, its categorisation has proved to be problematic. Some have argued that the protection of nationals abroad has emerged as a new sphere to self-defence rather than as a separate doctrine: however, this assertion is hindered by the fact that in many cases where the protection of nationals has been invoked, the qualifications attributed to self-defence have been nowhere to be found.⁶²⁰ Secondly, safe from the controversial end to the Entebbe incident,⁶²¹ the doctrine has arguably never been used as a stand-alone claim or as the clear-cut primary argument.⁶²² Instead, it has often been invoked alongside other justifications, most prominently self-defence and intervention by invitation.⁶²³ For these reasons, the concept has had a difficult time in emerging as a solid legal doctrine, which need not rely on other legal bases.

In any event, at this stage the protection of nationals abroad has been a controversial argument at best, and it appears that the members of the international community are polarised when it comes its applicability.⁶²⁴ Not surprisingly, the militarily powerful have been the concept's biggest proponents, which starkly contrasts with the negative opinions of smaller States. If we speak of pure numbers, most States appear to be resisting the emergence of the concept.⁶²⁵ However, the smaller pool of States who support protection of nationals abroad consists of the influential ones, those usually in charge of flexing and testing the limits on the use of force.⁶²⁶

As with the concept of unilateral humanitarian intervention, the failure of the protection of nationals abroad to emerge as a valid doctrine relates to the threat it poses to the sovereignty of the target States. In its purest form, the rationale behind the protection of nationals abroad rests upon the assumption that the territorial States has somehow failed, and that as a result, an intervention is necessary. If this supposed failure is paired with the valid consent of the host State, as has been done various times in the

⁶²⁰ Tanca, *Foreign Armed Intervention*, pp. 183-184; Dixon and McCorqudale, *Cases and Materials*, p. 546.

⁶²¹ Harris, *Cases and Materials*, pp. 909-912.

⁶²² Corten, 'Russian Intervention', p. 32; Gray, *International Law and the Use of Force*, pp. 88-92.

⁶²³ Harris, *Cases and Materials*, p. 912; Tanca, *Foreign Armed Intervention*, pp. 183-184; Gray, *International Law and the Use of Force*, pp. 88-92; Green, 'Editorial Comment', pp. 6-7.

⁶²⁴ Mathias Forteau, 'Rescuing Nationals Abroad', in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford, Oxford University Press, 2015), p. 961.

⁶²⁵ *Ibid.*

⁶²⁶ *Ibid.*

past,⁶²⁷ the outcome should not be too controversial. However, if armed force is pursued without such consent, or due to thinly disguised political objectives, the activities can easily be regarded as hostile.⁶²⁸

It would therefore appear that the protection of nationals abroad has found most success as a political side argument to intervention by invitation. In such circumstances, the consent of the host State acts as the main justification for the intervention, whereas the protection of nationals abroad explains why the intervening State is best suited for the task. As a standalone argument, however, the concept is bound to be insufficient, for it could result in aggressive measures against the territorial State, which is most likely why States have avoided doing so in the past.⁶²⁹ Hence, even the notable proponents of the concept have deemed it pertinent to chiefly rely on it only in conjunction with other justifications for armed force, including intervention by invitation.⁶³⁰

4.2.3. Other Notable Challenges to the UN Charter's System: The Use of Force to Enforce External Self-Determination

Besides intervention by invitation, the protection of nationals abroad and humanitarian intervention have been the most longstanding challenges to the UN Charter. While other claims have appeared, they are less-known and more concentrated on specific time periods: their effect may thus be limited to certain occasions or timeframes only. Hence, it would not be pertinent to examine many of these concepts, as they bear little relevance in present day. Still, one argument may command attention.

Of these more short-lived ventures, the one concerning use of force and the self-determination of peoples still has a certain curiosity in today's international law.⁶³¹ The idea first emerged during the decolonisation of 1960s and 1970s, when the international community discussed measures which could be exhausted to realise the process in full.⁶³² The prospect of using armed force was brought up *inter alia* during the drafting process of the Friendly Relations Declaration of 1970.⁶³³ However, the concept was quickly debunked due to the resistance of Western States, who were unwilling to go to such

⁶²⁷ Tanca, *Foreign Armed Intervention*, pp. 179-80 and 183-184; Gray, *International Law and the Use of Force*, pp. 89-90.

⁶²⁸ Gray, *International Law and the Use of Force*, p. 92.

⁶²⁹ Corten, 'Russian Intervention', pp. 31-32.

⁶³⁰ *Ibid.*; Harris, *Cases and Materials*, p. 912; Gray, *International Law and the Use of Force*, pp. 88-92; Cassese, *International Law*, p. 366.

⁶³¹ Green, 'Editorial Comment', p. 7; Corten, 'Russian Intervention', pp. 30-31.

⁶³² Gray, *International Law and the Use of Force*, p. 59-61.

⁶³³ *Ibid.*, p. 61; Hakapää, *Uusi kansainvälinen oikeus*, pp. 521-522; Georg Nolte, 'Secession and External Intervention' in Marcelo G. Kohen (ed), *Secession: International Law Perspectives* (Cambridge, Cambridge University Press, 2006), pp. 88-89.

lengths to advance external self-determination.⁶³⁴ As a result, the Declaration was finalised with no mention to available military measures in reference to self-determination.⁶³⁵ In fact, many have interpreted the document as endorsing restraint and non-intervention for third States in such situations.⁶³⁶ Notably, the debate over the use of force to realise secession quickly subsided after the completion of the decolonisation process, and by the 1980s the matter had lost most of its relevance in the international community.⁶³⁷

The initial, quickly diffused attempt to allow the use of force to advance secession differs from other ventures in a major way: any hope of its success was quashed by the Western States, many of whom have often advocated new forms of armed intervention.⁶³⁸ This partially explains why the attempt was tied to a specific timespan and circumstances. With almost no consistent military powers to advance it, the venture's chances of reaching long-time support were very slim. This also mirrors the Western dominance over the world order: legal ventures unapproved by these States have a much harder time gaining enough traction to emerge as valid doctrines.

Nevertheless, issues over secession and external force are unfinished, as the independence ventures of various regions have risen to the forefront of international legal debate.⁶³⁹ It was discussed following the NATO intervention in Kosovo in the late 1990s: however, this use of force cannot be interpreted as a direct attempt to reawaken the venture concerning armed measures and secession. The intervening coalition carefully argued that it did not intend to advance the region's separation from Serbia, and instead claimed to have preserved the safety of the people living in the area, thus focusing on humanitarian aspects.⁶⁴⁰ However, Kosovo's independence declaration did take place less than a decade later, and the past armed intervention must have had some effect on it.⁶⁴¹ Still, it would appear that use of force to realise secession has not gained new momentum

⁶³⁴ Hakapää, *Uusi kansainvälinen oikeus*, pp. 521-522; Gray, *International Law and the Use of Force*, p. 61; Nolte, 'Secession and External Intervention', p. 89.

⁶³⁵ See *Friendly Relations*, Principle V.

⁶³⁶ *Ibid.*, Principles I and III; Nolte, 'Secession and External Intervention', pp. 88-89.

⁶³⁷ Nolte, 'Secession and External Intervention', pp. 88-89; Gray, *International Law and the Use of Force*, p. 59.

⁶³⁸ Nolte, 'Secession and External Intervention', pp. 88-89; Cassese, *Self-Determination of Peoples*, pp. 199-200.

⁶³⁹ Hakapää, *Uusi kansainvälinen oikeus*, pp. 521-522; Sterio, *Right to Self-Determination*, pp. 2-3.

⁶⁴⁰ Nolte, 'Secession and External Intervention', p. 92; Record of the Security Council's 3988th Meeting, 24 March 1999, UN Doc. S/PV.3988, pp. 4-6 and 8-9; Record of the Security Council's 3989th Meeting, 26 March 1999, UN Doc. S/PV.3989, pp. 4-5.

⁶⁴¹ Letter dated 19 February 2008 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, 26 February 2008, UN Doc. A/63/62-S/2008/123.

as such, despite the current debate on the limits of external self-determination. Conversely, and very interestingly from the perspective of this study, some attempts have linked secession with armed intervention by invitation. These attempts will be discussed later in the thesis.⁶⁴²

4.3. The Rationale Behind the Relative Success of Invited Interventions

No matter how one perceives the current situation, it remains clear that other outlier uses of force have not met success comparable to that of intervention by invitation.⁶⁴³ Their legal positions remain mixed at best and refuted at worst. As such, none of the ventures discussed above can be regarded as having been fully crystallised as an applicable legal norm, even though they periodically appear in argumentation. Nonetheless, in the end these propositions have failed to attain widespread support from the international community, as their application has been advanced by the select few.⁶⁴⁴

Certain reasons for this outcome can be unearthed when the decision-making processes of these ventures are compared to that of intervention by invitation. Not surprisingly, the most prominent proponents of the concepts that fall beyond the scope of the Charter are the great military powers.⁶⁴⁵ In contrast, the States which have tended to oppose new military ventures have been the smaller ones, which did in fact accept the application of invited interventions— albeit reluctantly. This should not be too shocking. Intervention by invitation, while in many respects problematic, also has pros for smaller States, as it optimally allows inviting more powerful allies to restore order. In other words, intervention by invitation, at least on paper, can be executed in accordance with the inviting State's will, and thus protect that State's sovereignty. Moreover, as noted earlier, intervention by invitation has subtly served a wider, community-driven purpose, at least during its initial renaissance over the course of the Cold War.⁶⁴⁶

These opportunities, however, appear to be much less likely with the other forms discussed in this section. These concepts are ideas which inevitably threaten the sovereignty of the territorial State. All notions are in one way or another based on the assumption that the territorial State has somehow failed, which justifies the foreign armed intervention on its soil. If these movements were to gain momentum, it would inevitably lead to tarnishing the sovereignty of smaller States at the expense of the powerful ones,

⁶⁴² See Chapter V, Section 3.2.

⁶⁴³ Tanca, *Foreign Armed Intervention*, pp. 111-125; Gazzini, *Changing Rules*, pp. 170-179; Gray, *International Law and the Use of Force*, pp. 35, 52, 61 and 65-66; Franck, *Recourse to Force*, p. 109-112 and 135.

⁶⁴⁴ Green, 'Editorial Comment'. pp. 3-4; Gray, *International Law and the Use of Force*, pp. 34-35 and 88-92.

⁶⁴⁵ *Corfu Channel*, p. 35; *Nicaragua*, paras. 207-208.

⁶⁴⁶ See Section 1. of this chapter.

which is already the worst-case scenario of military intervention. Furthermore, the ventures have thus far failed to set values which are commonly agreed upon. This is well exemplified by humanitarian intervention: despite its noble motives, many States continue to voice doubts over the concept's true intentions, indicating that little mutual ground exists. In other words, each of these budding doctrines must strive for a purpose which benefits the international community as a whole, either explicitly or implicitly.

Although these arguments are yet to find success, the emergence of new, valid exceptions to the prohibition of armed force is possible in the future. After all, international law on the matter is flexible by nature. In fact, the birth of modern invited interventions can be attributed to such a premise. Nevertheless, in order for this to happen, the ventures discussed here may have to follow the routine of invited interventions. By doing this, they may be able to appeal to the entire global community. Although the powerful States are certainly the ones who push for new forms of armed intervention, these propositions must also gain the support of other members of the international community: in other words, sporadic practice is not enough.⁶⁴⁷

However, it is highly unlikely that these concepts could follow a path identical to that of invited interventions. As noted earlier, even in the most generous of terms, intervention by invitation is a flimsy legal doctrine that is prone to frequent abuse. It has been allowed to remain as such because it is of benefit to the powerful States. Still, this premise is also due to the doctrine not diametrically and absolutely threatening the notion of State sovereignty. This allows smaller States to find intervention by invitation usable as well, even if its contents remain muddled. However, this is not the case with the other ventures discussed here. Allowing these concepts to exist with similarly hazy and debatable limits would easily prove undesirable for many, if not most, States. Of course, these concerns can become futile in the long run, as international norms may form in unforeseeable patterns. This allows openings for new forms of armed force as well. But for now, intervention by invitation remains the single biggest success outside the context of the Charter.

⁶⁴⁷ *Corfu Channel*, pp. 35-36; *Nicaragua*, paras. 185-187 and 206-207.

5. Final Remarks on the Normative Process of Intervention by Invitation

The uneven re-emergence of intervention by invitation has made the concept's legal basis unclear and subject to interpretation. Despite these convolutions, the doctrine has been able to reclaim a position in international law despite the limitations of the Charter. It should therefore be regarded as an out-of-bounds exception to the prohibition enshrined in Article 2(4), reinvigorated by the doctrine of State responsibility, rather than being a concept which was always meant to be acceptable under the Charter. It is a concept born out of decision-making process involving both sovereign States and the bodies of the United Nations, which accepted the reinstallation of the doctrine. This development was necessary to patch up the damage sustained by the Charter's regulation during the political crises that engulfed the international community following 1945.

Indeed, intervention by invitation was able to facilitate the process due to the Cold War, for the politics of the era left collective security paralysed while numerous internal conflicts began to command the attention of individual States. When put together, these ingredients paved the way for invited interventions and permitted the concept to become a prominent practice. This persistent application, although in many respects troubling, subsequently led to an amendment which reinstated invited interventions in international law. While this is far from an ideal situation, the flexible legal framework of the Charter does make such developments possible. This possibility is precisely what occurred with intervention by invitation post-1945, resulting in its reintroduction.

Despite this conclusion, intervention by invitation has been allowed to exist without a full explanation of its precise legal justification. This has made the doctrine hazy and prone to abuse. The premise is confusing, but it makes sense for States who wish to apply the doctrine in practice: the flimsy limits allow the doctrine some much needed flexibility, which makes its invocation possible under many circumstances. To state it differently, the ambivalence serves the policies of the States that often intervene upon request, a finding which further cements the doctrine's position as a political measure.

Of course, this premise clearly creates many concerns for smaller States, who are much more likely to be the targets of armed interventions. Still, the fact that intervention by invitation ultimately relies on the host State's sovereignty offers some assurance. Moreover, despite its antagonistic surface, intervention by invitation also functioned as a stabilising force during the decades of the Cold War. In the absence of collective security, it offered the superpowers of the time a method with which they could impose their influence upon others. While this practice did little to diminish the Cold War, it also kept the crisis at a sustainable level, thus attending to the damage caused to the Charter's regulation.

In fact, that intervention by invitation was born out of the misgivings of the implementation of the Charter, in particular collective security, is evident. The outcome and the correlation of the concepts in this sense is not surprising. Their historical connection goes well beyond the UN era, all the way into the first appearances of armed interventions themselves. Furthermore, invited interventions are much more entwined with the concept of self-defence than would immediately seem to be. Even though self-defence did not play as big a part in the resurrection of invited interventions as collective security, the two doctrines are becoming more interlinked by the minute and have often been invoked side by side in various armed interventions.

Given how intervention by invitation has reappeared, an opening for the emergence of other forms of armed intervention does exist. However, since invited interventions had to circumvent the prohibition on the use of force, such forms will have to clear the same hurdle first. Many ventures have attempted to achieve this goal, but none of them have yet reached similar success. The state of matters has come about because these propositions, including unilateral humanitarian intervention and the protection of nationals abroad, in their purest forms depend on the failure of the territorial State. This means that such arguments are forwarded despite the sovereignty of the target States. Such a premise opposes the gist of intervention by invitation, which is legally based upon the sovereign capacity of the host State, despite its many flaws. As such, its re-emergence was less complicated, which is exemplified by the frostier responses towards the other ventures.

Still, one can appreciate that the re-awakening of intervention by invitation is far from a simple affair. While traceable, the justification behind intervention by invitation remains ambivalent, which in turn distorts the general picture of the regulation on the use of force. Consequently, intervention by invitation, while being the product of decision-making by international subjects, can hardly be described as a flawless display of international law-making. Rather, it is multi-layered yet ultimately community-driven, and it has been allowed to operate despite causing complications.

What is further, this unmistakable convolution is immediately mirrored in the doctrine's application in practice, which has been remarkably eventful and often non-linear. This should come as no surprise. After all, any legal concept sets the context for their application, and if the concept fails to define itself properly, one can expect similar surges of identity crisis from its appearances in practice. In other words, intervention by invitation has faltered in producing sturdy legal limits as to how it should be applied. As a result, the same ambivalence which surrounds the concept's justification also impedes its application, as the next chapter will showcase.

Chapter IV

A Delicate Concept in Practice — What Is Intervention by Invitation For?

1. Computing the Practice of a Shadowy Concept

1.1. The General Practical Framework of Intervention by Invitation

If the legal nuances behind intervention by invitation are difficult to grasp, then the concept's practice does not offer much relief, either. Due to how it resurged during the UN era, the doctrine's practice has been laced with difficulties, which has resulted in its requirements being wide-ranging and complicated. This convolution is reflective of the confusion over justification of the doctrine. After all, the rebirth of invited interventions is immediately linked to the practice of States, since the doctrine re-emerged as an outlier exception to the prohibition on the use of force due to the persistent activities by States.⁶⁴⁸ If such practices were clear-cut, the legal reasoning would follow suit. But alas, this is not the case, which can only mean that the practice on intervention by invitation must deal with several issues, and on various levels at that.

Given its challenging premise, detailing the doctrine's practical requirements and limits is not easy. Should one need to rattle off the conditions for intervention by invitation in a single take, it could very well be this: intervention upon invitation is allowable when the host State issues a genuine request in its sovereign capacity, as long as the military activities stay within the boundaries of the consent and other pertinent norms of international law.⁶⁴⁹ This sentence is far from self-explanatory, and leaves much room for interpretation. Moreover, the situation also enables misuse, which has unfortunately presented itself in practice.

As a result, the doctrine's practice is best described as fractured. States and commentators alike have disagreed over the identification of the legal representative of the host State, how the invitation must be issued and withdrawn, as well as if and how the intervention may be practiced under different circumstances.⁶⁵⁰ Hence, due to the lack of clear requirements and frameworks, putting invited interventions into practice has proved

⁶⁴⁸ See Chapter III, Section 2.4.

⁶⁴⁹ *International Law Commission's Draft Articles on State Responsibility*, Articles 20 and 26; *Definition of Aggression*, Article 3(e); *Nicaragua*, para. 246; Lieblich, 'Intervention and Consent', p. 341; le Mon, 'Unilateral Intervention by Invitation', p. 743; Vienna Convention on the Law of Treaties, Articles 53 and 64.

⁶⁵⁰ Lieblich, 'Intervention and Consent', pp. 340-341; le Mon, 'Unilateral Intervention by Invitation', pp. 743-746; de Wet, 'Modern Practice of Intervention by Invitation', pp. 981-983 and 992-993.

immensely difficult.⁶⁵¹ In fact, the most immediate controversies concerning the doctrine stem from the conditions of its application and how it should pan out in various contexts.⁶⁵² State activities exemplify this well: often when States have opposed certain invited interventions, they have done so because of a perceived breach of practical requirements, not because they view the whole concept as being unlawful.⁶⁵³ To put it differently, States themselves appear to consider the practical matters the most important issue concerning intervention by invitation, as they desperately attempt to rein in the concept while still keeping it applicable.

1.2. Building the Context Further: A Quick Recap of Applying Intervention by Invitation since 1945

Given the erratic practice of invited interventions, drawing definite lines is a difficult task. However, it is possible to examine the State practice after the adoption of the Charter and note the widely identified issues. With these issues in hand, solutions may be discovered, which helps in forming more lucid conditions and limitations for intervention by invitation. Hence, before moving to these specific conditions, we will first discuss the general evolution of the practical issues of intervention by invitation, decade by decade.

Skippping over the 1940s is pertinent, as this decade was largely marked by the Second World War and its aftermath. Instead, as the practice on consensual use of force began to resurge in the 1950s, we should begin our evaluation there. Still, while invited interventions began to gain momentum during this decade,⁶⁵⁴ the general response to such military activities was cautious at best.⁶⁵⁵ Of course, this feedback could in part have been facilitated by the controversy of particular interventions, such as Soviet Union's armed activities in Hungary in 1956.⁶⁵⁶ Nonetheless, some dissenting voices actually questioned the entire legality of the practice. Such opinions were expressed *inter alia* in 1957, when Iraq, amongst various other Middle Eastern States, claimed that the United Kingdom had no right to intervene on the request in the Sultanate of Muscat and Oman.⁶⁵⁷ Moreover,

⁶⁵¹ Cassese, *International Law*, pp. 370-371.

⁶⁵² *Ibid.*, p. 370; Crawford, Brownlie's *Principles*, pp. 769-770.

⁶⁵³ Le Mon, 'Unilateral Intervention by Invitation', p. 743; Brownlie, *International Law and the Use of Force*, p. 317; Crawford, Brownlie's *Principles*, pp. 769-770.

⁶⁵⁴ Marston (ed), 'United Kingdom Materials', p. 616; Tanca. *Foreign Armed Intervention*, pp. 149-154.

⁶⁵⁵ Tanca, *Foreign Armed Intervention*, pp. 149-154.

⁶⁵⁶ *The Situation in Hungary*, GA Res. 1004 (ES-II), Preamble and paras. 1-2; *The Situation in Hungary*, GA Res. 1005 (ES-II), Preamble and para. 1; *The Situation in Hungary*, GA Res. 1131 (XI), Preamble and para. 1.

⁶⁵⁷ Tanca, *Foreign Armed Intervention*, p. 151; Letter dated 13 August from the Permanent Representatives of Egypt, Iraq, Jordan, Lebanon, Libya, Morocco, Saudi Arabia, Sudan, Syria and Yemen addressed to the President of the Security Council, 15 August 1957, UN Doc. S/3865,

the invitation of the host State was at times regarded as an unstable legal argument. An example can be found in the United Kingdom's intervention in Jordan the following year, when States mostly focused on debating whether the self-defence exception applied, leaving intervention by invitation on the back-burner.⁶⁵⁸ When put together, these responses seem to suggest that the doctrine had not yet fully regained its footing, even if it made appearances in practice.

By the 1960s, however, such concerns about the doctrine's status had largely vanished. With the Cold War politics now in full gear, intervention by invitation had become a frequently exhausted asset, leaving little room for doubt over its lawfulness.⁶⁵⁹ Instead, attention had turned to the manner in which invited interventions were applied, bringing the practical requirements of the concept to the forefront of debate, despite the clear legal vacuum.⁶⁶⁰ As it transpired, many invited interventions were challenged due to supposedly breached conditions, with objections *inter alia* made about the inviting authority and whether the invitation was actually genuine.⁶⁶¹ Moreover, the matter of intervening in the midst of a civil war raised particular concerns, and was consequently codified in the work of the General Assembly.⁶⁶² In practice, perhaps the most infamous of the many questionable invited interventions is the Soviet-led intervention in Czechoslovakia in 1968, which resulted in predominantly negative opinions within the international community.⁶⁶³

The 1970s and 80s followed suit: invited interventions were applied consistently, with some finding more success than others. Notably, the first of these decades provided certain limitations for the concept's application, courtesy of the General Assembly. During this time, the organ passed two important Resolutions, the *Friendly Relations Declaration* (1970) and the *Definition of Aggression* (1974). The former *inter alia* denounced foreign use of force aimed at denying the self-determination of the territorial State's people, while the latter noted that when an invited intervention exceeds its limits, it may amount to aggression against the host State.⁶⁶⁴ These remarks, while brief, do showcase attempts to define the limits of intervention by invitation.

p. 1; Letter dated 21 November 1957 from the Representatives of Egypt, Iraq, Jordan, Lebanon, Libya, Morocco, Saudi Arabia, Sudan, Syria, Tunisia and Yemen addressed to the President of the Security Council, 22 November 1957, UN Doc. S/3915, para. 2.

⁶⁵⁸ Tanca, *Foreign Armed Intervention*, p. 152.

⁶⁵⁹ Gray, *International Law and the Use of Force*, pp. 84-85.

⁶⁶⁰ Cassese, *International Law*, pp. 369-370.

⁶⁶¹ *Ibid.*, p. 369; Wippman, 'Military Intervention', p. 211.

⁶⁶² *Inadmissibility of Intervention*, Preamble and para. 2.

⁶⁶³ Wippman, 'Military Intervention', p. 211; Record of the Security Council's 1443rd Meeting, paras. 9-12, 18-19, 65.70, 284, 289 and 291-292.

⁶⁶⁴ *Friendly Relations*, Principles I and V; *Definition of Aggression*, Article 3(e).

The 1980s proved to be particularly important for the concept as well, as a case touching upon it was at last brought before the ICJ. The *Nicaragua* case (1986) finally confirmed that intervention by invitation is indeed 'allowable' upon the request of the lawful government.⁶⁶⁵ However, the Court did not adjudge upon the doctrine in much detail, leaving vague the matters concerning its practice.⁶⁶⁶ This vagueness was manifested in practice several times over the decade, for example in the controversial US interventions in Grenada (1983) and Panama (1989), which *inter alia* brought into question the qualifications concerning the inviting authority.⁶⁶⁷

The 1990s, however, provided yet another gear change for invited interventions. As the power relations between the East and West changed at the turn of the decade, the partial revitalisation of the Security Council, which began to tackle internal conflicts, placed the organ in the same field as invited interventions.⁶⁶⁸ The evolution has continued well into the new millennium, for two general issues have become particularly important. As the definitions of internal and international conflicts have become more blurred, invited interventions have been consistently applied during non-international armed conflicts — despite the rule that any foreign intervention in such circumstances violates the duty of non-intervention.⁶⁶⁹ Furthermore, the increased interventions in non-international armed conflicts have brought up the question of the legitimate representative of a State and how one should determine it. In multiple cases, a foreign State has pledged its military support to what would traditionally be labelled as a rebelling factor, bringing forth conflicting accounts on the purported legitimate authority.⁶⁷⁰

To sum up, even though the practice first faced some doubts, attention quickly turned to the specific conditions and circumstances of invited interventions. This finding again reaffirms that while the doctrine's applicability is accepted, its practice is still a source of controversy. The issues that have persisted throughout the decades concern the inviting authority, its legitimacy and situations in which it may lose this legitimacy.⁶⁷¹ Of specific concern have been invited interventions during non-international armed conflicts and

⁶⁶⁵ *Nicaragua*, para. 246.

⁶⁶⁶ *Ibid.*

⁶⁶⁷ Record of the Security Council's 2489th Meeting, 26 October 1983, UN Doc. S/PV.2489, paras. 80-81 and 146; Record of the Security Council's 2902nd Meeting, pp. 7-8, 17 and 23-25.

⁶⁶⁸ Gray, *International Law and the Use of Force*, pp. 266 and 272; Gazzini, *Changing Rules*, pp. 31-32; Franck, *Recourse to Force*, pp. 40-41; Tanca, *Foreign Armed Intervention*, pp. 147-148; David D. Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 *American Journal of International Law* 552, p. 553.

⁶⁶⁹ Akande and Vermeer, 'The Airstrikes against Islamic State in Iraq', *EJIL: Talk!*, 2 February 2015.

⁶⁷⁰ de Wet, 'Modern Practice of Intervention by Invitation', pp. 982-983; Fox, 'Intervention by Invitation', p. 838.

⁶⁷¹ de Wet, 'Modern Practice of Intervention by Invitation', pp. 982-984 and 990-991.

internal unrests that have resulted in the denial of the self-determination of the host State's people.⁶⁷² Moreover, it remains slightly unclear how the application of invited interventions relate to other forms of armed force, most notably collective use of force. Under more modern circumstances, intervention by invitation has also aimed to serve the fight against international terrorism, especially when countermeasures are undertaken in the context of non-international armed conflicts.⁶⁷³

To address these issues, the analytic sections of this chapter have been structured thusly. The first topic will concern the invitation itself, to determine how it must be issued and retracted, with the additional objective of discerning why these conditions have come about (2). The chapter will then move on to the aspect of intervention itself by examining the circumstances in which invited interventions tend to be applied (3). The section will attempt to discover an underlying, common purpose for States practicing invited interventions in different contexts. Finally, the analysis will be closed with overall conclusions on the application of invited interventions, which will immediately lead to the next chapter of the thesis (4).

⁶⁷² *Friendly Relations*, Principle V; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 860.

⁶⁷³ Henderson, 'Editorial Comment', pp. 210 and 213-214.

2. The Invitation to Intervene: What Is Required and Why?

As the name of the doctrine already suggests, intervention by invitation can be divided into two parts: the intervention and the invitation. For the purposes of analysis, it is pertinent to begin with the invitation, since it legitimises the armed intervention itself. Issuing an invitation has been divided in two major categories: substantive and procedural conditions.⁶⁷⁴ Substantive conditions, which concern the matter of who may consent to the intervention,⁶⁷⁵ will be dealt first. Procedural requirements, which entail the form and manner of the invitation itself,⁶⁷⁶ will be discussed afterwards. Once these thresholds for issuing an invitation have been established, attention will turn to the withdrawal of an invitation. This specific issue will be addressed to discover if the withdrawal must be conducted in a certain manner for it to be considered effective.

In addition, the section seeks to explain why these requirements come in so many numbers, and what processes they have been subjected to over the decades. Of specific interest is discovering whether the practical qualifications of intervention by invitation have been affected by global values, despite the doctrine's apparent advocacy of sovereign interests.

2.1. Substantive Conditions for Consent: Identifying the Legitimate Representative

2.1.1. Drawing the Line Between the Government and the Opposition

The whole legality of intervention by invitation is based on the premise that the consent of the host State validates the use of force which would otherwise be unlawful.⁶⁷⁷ It is therefore of utmost importance that this consent is given by an actor that can properly manifest the sovereign will of the host State: if the consent cannot be internationally attributed to the State, the intervention remains in violation with international law.⁶⁷⁸ For this reason, much thought has been dedicated to deciphering who has the authority to speak for the State and invite a foreign armed intervention.⁶⁷⁹ Some might say that this dilemma was effectively solved by the ICJ in *Nicaragua*, when it was stated that only the

⁶⁷⁴ Liebllich, 'Intervention and Consent', pp. 340-341.

⁶⁷⁵ *Ibid.*, p. 340.

⁶⁷⁶ *Ibid.*, p. 341.

⁶⁷⁷ *International Law Commission's Draft Articles on State Responsibility*, Article 20; Tanca, *Foreign Armed Intervention*, pp. 13-16.

⁶⁷⁸ *Nicaragua*, para. 246; Schachter, *International Law in Theory and Practice*, pp. 114-115.

⁶⁷⁹ Schachter, *International Law in Theory and Practice*, pp. 114-115.

government of the host State may issue a valid invitation to intervene, whereas the opposing forces hold no such right.⁶⁸⁰

The core justification of this finding lies in the principle of non-intervention, according to which one State cannot forcibly intervene in the affairs of another.⁶⁸¹ However, no unlawful intervention can occur if the action is pursued in accordance with the will of a State,⁶⁸² which can be expressed by its legitimate representative.⁶⁸³ The government, as such a representative, may validly request outside help in the capacity accorded to it by the country and its subjects. Militarily supporting the opposition, which has no such mandate, could result in the disassembly of the principle of non-intervention altogether, as such activities may aim to support a political coup within the host State: a matter in which other States should have no involvement.⁶⁸⁴

This appears simple enough, but it has been noted that the findings in *Nicaragua* were based on certain utopian or even false assumptions.⁶⁸⁵ For instance, presuming that the government is the very embodiment of the singular will of a State and its people is simply short-sighted.⁶⁸⁶ This is obviously the case in countries led by dictators, but it also holds true for nations that uphold the democratic values and structures traditionally endorsed by Western societies.⁶⁸⁷ One of the core ideas of democracy is that people are allowed to have different stances about political and societal matters: this will inevitably lead to division in opinions. Such division is considered to be a sign of democratic success.

Hence, it is admitted that no people living in a democracy can speak with a completely unified voice. While this is accepted, it can lead to difficulties when applying to armed interventions by invitation. If no government is fully backed its subjects, no military action pursued at the consent of such government can truly be in accordance with the will of the people and thus the host State itself.⁶⁸⁸ This position becomes even more problematic since foreign intervention by invitation is likely to, if not be directly aimed at, at least affect the health and safety of these people.

Perhaps because of these reasons, the *Nicaragua* principle, despite its apparent simplicity, has proven difficult in practice. States have not impugned the outlook that only

⁶⁸⁰ *Nicaragua*, para. 246.

⁶⁸¹ *Ibid.*, paras. 206-207 and 246; *Rights and Duties*, Articles 1 and 3-4; *Inadmissibility of Intervention*, paras 1-2; *Friendly Relations*, Principle III.

⁶⁸² Jennings and Watts, Oppenheim, p. 435.

⁶⁸³ *Nicaragua*, para. 246.

⁶⁸⁴ *Ibid.*; *Rights and Duties*, Articles 1 and 3-4; *Inadmissibility of Intervention*, paras 1-2; *Friendly Relations*, Principle III.

⁶⁸⁵ David Wippman, 'Treaty-Based Intervention: Who Can Say No' (1995) 62 *University of Chicago Law Review* 607, p. 625.

⁶⁸⁶ *Ibid.*

⁶⁸⁷ *Ibid.*

⁶⁸⁸ *Ibid.*

governments or similar actors may invite foreign interventions, but they have argued over their qualifications.⁶⁸⁹ In particularly turbulent situations, such as internal strife and rebellions, some States have argued that the status of the legitimate representative of the host State has shifted from the previously recognised government to another factor.⁶⁹⁰ Although much rarer, similar comments have been made by the international community at large: a famous example is recognising the interim Libyan government as the State's legitimate representative during the 2011 military intervention.⁶⁹¹

Hence, although a line has been drawn between the government and the opposition of any given State, this line has recently become finer. States and scholars alike have differing opinions on how one qualifies as a valid government — or a government that has lost its authority for that matter. The *Nicaragua* case does not offer any solutions, as the Court did not take the time to define the qualifications for the valid government.⁶⁹² While the Court did return to similar issues concerning the use of force in *DRC v. Uganda* in 2005, it did not clarify the matter of the legitimate government, either.⁶⁹³ This has left much room for debate, and the task has been taken up by various different actors over multiple decades.

Two main arguments have been established in these debates: effective control and democratic legitimacy. The primary candidate between the two has been that of effective control, an argument according to which the legitimate government is the one exercising effective control over the territory of the State.⁶⁹⁴ As long as effective control is maintained, the government may speak for the State: this premise cannot be wavered by the manner in which the government gained its position.⁶⁹⁵ The effective control argument, while unyielding in certain aspects, has been favoured by many observers due to its non-interfering nature, as it does not require inquiry into the internal matters of the host State.⁶⁹⁶ However, it has been challenged by the outlook that emphasises democratic legitimacy as the primary qualification for the lawful government.⁶⁹⁷ This argument

⁶⁸⁹ de Wet, 'Modern Practice of Intervention by Invitation', pp. 982-983.

⁶⁹⁰ *Ibid.*, p. 983.

⁶⁹¹ See *Report of the Credentials Committee*, 14 September 2011, UN Doc. A/66/360, para. 4; *Credentials of Representatives to the Sixty-sixth Session of the General Assembly*, GA Res. 66/1/A, 16 September 2011, UN Doc. A/RES/66/1/A; Fox, 'Intervention by Invitation', p. 838; BBC, 'Libya: France recognises rebels as government', *BBC News*, 10 March 2011, <www.bbc.com/news/world-africa-12699183>; BBC, 'US recognises Libyan rebel TNC as legitimate authority', *BBC News*, 15 July 2011, <www.bbc.com/news/world-africa-14164517>.

⁶⁹² For the general notions made by the Court on the matter, see *Nicaragua*, para. 246.

⁶⁹³ *DCR v. Uganda*, paras. 42-54 and 160-65.

⁶⁹⁴ Wippman, 'Military Intervention', p. 214.

⁶⁹⁵ le Mon, 'Unilateral Intervention by Invitation', p. 745.

⁶⁹⁶ *Ibid.*

⁶⁹⁷ Wippman, 'Military Intervention', pp. 216-217 and 219-220.

inevitably draws justification from the recognition of governments, a practice that has been controversial in international relations for quite some time, in particular where formally recognising rebels is concerned.⁶⁹⁸ Nevertheless, some States have been willing to exhaust this justification, even though the international reactions to interventions enacted on such a basis have tended to be frosty.⁶⁹⁹

Since these responses have gained a following, it is important to study both in this section. However, one should remain cautious during this examination; after all, when it comes to armed interventions, States tend to change their opinions in accordance with political tides.⁷⁰⁰ This premise applies to intervention by invitation as well, including the debate over effective control and democratic legitimacy.⁷⁰¹ Thus, it is pertinent to evaluate the effective control test and the democratic legitimacy qualification separately at first, and only afterwards pit them against each other to see which prevails.

2.1.2. The Effective Control Argument: The Premise of Evaluation

While the matter is debated, thus far the logical starting point for any evaluation of the valid representative of the host State has been the effective control test.⁷⁰² According to this argument, simply identifying the *de jure* government of the host State is not enough when examining its power to invite a foreign military intervention.⁷⁰³ Conversely, the legitimate government must still be effective (capable of governing the country) in order to act on behalf of the host State, especially to invite a foreign intervention to its soil.⁷⁰⁴ This stance has persisted due to the finding that commentators have traditionally arrived at: the loss of effectiveness has been coupled with the loss of control over the host State itself.⁷⁰⁵ Hence, if control is not maintained, the government can no longer speak on behalf of the territorial State, especially if its position has been challenged by another faction.⁷⁰⁶ And indeed, many arguments for interventions by invitation have been debunked due to the government's purported loss of effective control: this loss can be realised even without rivalling factions.⁷⁰⁷

⁶⁹⁸ de Wet, 'Modern Practice of Intervention by Invitation', p. 983.

⁶⁹⁹ Record of the General Assembly's 44th Session, 88th Plenary Meeting, 29 December 1989, UN Doc. A/44/PV.88, pp. 2-5, 18, 38-40, 48-50 and 53-55.

⁷⁰⁰ *Nicaragua*, paras. 185-186 and 206-207.

⁷⁰¹ For example, see the Record of the Security Council's 7125th Meeting, pp. 3-4 and 18, where the US and Russia's arguments on democratic legitimacy directly contradicted former stances.

⁷⁰² Fox, 'Intervention by Invitation', p. 833.

⁷⁰³ de Wet, 'Modern Practice of Intervention by Invitation', pp. 983-984.

⁷⁰⁴ *Ibid.*, p. 984.

⁷⁰⁵ Wippman, 'Military Intervention', p. 212.

⁷⁰⁶ *Ibid.*, pp. 212 and 224.

⁷⁰⁷ Daniel Wiseheart, 'The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia's Intervention?', EJIL: *Talk!*, 4 March 2014, <[www.ejiltalk.org/the-crisis-in-](http://www.ejiltalk.org/the-crisis-in-ukraine-and-the-prohibition-of-the-use-of-force-a-legal-basis-for-russias-intervention/)

At its simplest, the effective control test is as follows: the government holds its validity as long as it exercises effective control over the host State and its territory.⁷⁰⁸ This approach has a neutral nature that takes little to no stance on the internal democratic order of the host State: it merely examines certain technical qualifications of control over the State's territory.⁷⁰⁹ In fact, in its purest form the effective control test requires no observations on how the host State's government gained and maintained its position.⁷¹⁰ This neutral outlook has helped the argument gain a prevalent place amongst scholars and various States.

However, the test is not without problems, as there are opposing opinions on what 'effective control' means. One could claim that it simply denotes the percentage of territory still under the government's control: as long as a certain amount of soil is covered, effective control remains intact as well.⁷¹¹ Still, it could also be held that other factors need to be taken into consideration, including the population, major cities or otherwise important locations.⁷¹² Only stressing the amount of territory would naturally be the most straight-forward response, but it may fail to take into account the individual circumstances of each particular case.

After all, given that States are constructed so differently, it may be hard to draw up definite guidelines for the effective control test. Some States have little territory but a large population, others are the exact opposite, and the rest fall somewhere in between. Consequently, saying that the amount of territory, population or important locations should always have the same value when assessing effective control might be counterintuitive. Perhaps the best rule of thumb in this situation would be that as long as an entity can effectively act as the government of the host State, while still holding a sufficient percentage of the territory and political apparatus, effective control is intact.⁷¹³ This rule is undeniably vague, but so is intervention by invitation as a doctrine.

The vagueness is also present in practice, as States have had wildly varying opinions on when a government has lost its legitimacy. On one hand, military support has been given to an actor that faced a belligerent factor in the host State. Such was the situation

ukraine-and-the-prohibition-of-the-use-of-force-a-legal-basis-for-russias-intervention>; Gregory Fox, 'Ukraine Insta-Symposium: Intervention in the Ukraine by Invitation', *Opinio Juris*, 10 March 2014, <opiniojuris.org/2014/03/10/ukraine-insta-symposium-intervention-ukraine-intervention>.

⁷⁰⁸ le Mon, 'Unilateral Intervention by Invitation', p. 745.

⁷⁰⁹ de Wet, 'Modern Practice of Intervention by Invitation', p. 984.

⁷¹⁰ Ibid., pp. 983-984; Wippman, 'Military Intervention', pp. 214-215.

⁷¹¹ de Wet, 'Modern Practice of Intervention by Invitation', pp. 983-984.

⁷¹² Ibid., p. 984; le Mon, 'Unilateral Intervention by Invitation', pp. 746-748.

⁷¹³ le Mon, 'Unilateral Intervention by Invitation', p. 745; Wippman, 'Military Intervention', p. 214; de Wet, 'Modern Practice of Intervention by Invitation', pp. 983-84.

in Sri Lanka between 1987 and 1990, when India militarily inserted itself in a conflict taking place in the country, basing its intervention upon an agreement conducted with the government.⁷¹⁴ By certain standards, the circumstances in Sri Lanka were considered to have reached the point of a civil war, and the government had even lost control of significant portions of its territory to other factions.⁷¹⁵ However, as the Security Council — or the United Nations in general — did not tackle the issue, India's intervention did not face too much criticism on a global scale.⁷¹⁶

Likewise, the US military intervention in Lebanon in 1958 was accepted by many Western States — but heavily criticised by the Soviet Union — although the host State's territory had already been partially overrun by government-opposing militias.⁷¹⁷ Another US intervention, this time in the Dominican Republic in 1965, faced backlash from the Soviet Union and several other States. It was *inter alia* argued that given the situation, no authority could have effectively invited the US intervention, which in turn resulted in violations of the ban on the use of force and the duty of non-intervention.⁷¹⁸ Still, the general response was much more mixed, and no Security Council Resolution refuting the US intervention was adopted.⁷¹⁹

This State practice leads us to the next issue over the effective control test: the amount of time that needs to pass for control to be lost. After all, only momentary loss of control does not necessarily mean that the government has been ousted: in fact, during the Second World War, many European governments even spent years in exile while still being considered to be the representatives of their respective States.⁷²⁰ When invited interventions were applied during the Cold War, it was generally accepted that effective control was not immediately lost if parts of the host State's territory were seized by actors other than the government.⁷²¹ This can be reflected in the aforementioned Sri Lanka case. Still, it appears that maintaining the ability to invite a foreign intervention warranted that the loss of effective control was brief.⁷²² Once a notable amount of time had passed since

⁷¹⁴ Roshani M. Gunewardene, 'Indo—Sri Lanka Accord: Invitation or Intervention?' (1991) 3 *Sri Lanka Journal of International Law* 173, pp. 173 and 177-179; Gray, *International Law and the Use of Force*, pp. 86-87.

⁷¹⁵ le Mon, 'Unilateral Intervention by Invitation', p. 786.

⁷¹⁶ Ibid., p. 785; Gray, *International Law and the Use of Force*, pp. 86-87.

⁷¹⁷ le Mon, 'Unilateral Intervention by Invitation', pp. 756-758.

⁷¹⁸ Ibid., pp. 764-767; Tanca, *Foreign Armed Intervention*, pp. 159-160.

⁷¹⁹ Tanca, *Foreign Armed Intervention*, p. 160; le Mon, 'Unilateral Intervention by Invitation', p. 767. The only Resolutions adopted on the matter did not address the US intervention, see *inter alia* *The Situation in the Dominican Republic*, SC Res. 203, 14 May 1965, UN Doc. S/RES/203 and *The Situation in the Dominican Republic*, SC Res. 205, 22 May 1965, UN Doc. S/RES/205.

⁷²⁰ Cassese, *International Law*, p. 73.

⁷²¹ de Wet, 'Modern Practice of Intervention by Invitation', p. 990.

⁷²² Ibid.

the position of the government had been questioned, justifying an armed intervention with the consent of such authority became more difficult.⁷²³

Nonetheless, the modern stance on this issue has questioned the Cold War frameworks. Recent invited interventions have been applied even when the formerly internationally recognised government has had diminished or no control over parts of its territory for months, in some cases even for years.⁷²⁴ In addition, intervention by invitation has been invoked during civil wars which, by their mere name, signal a significant loss of territory by the government to rebelling factions.⁷²⁵ The French intervention in Mali, which first began in early 2013 and continues today, is a good example of this.⁷²⁶ Mali has been in turmoil for many years, and by the end of 2012 the circumstances had escalated to the point of an internal armed conflict. During this time, the situation was under discussion by the Security Council, which ultimately decided to apply collective security on the matter.⁷²⁷ Despite this, Mali issued a direct plea to France and asked it to stage a unilateral armed intervention to stabilise the situation in the country.⁷²⁸ The French intervention was widely accepted in the international community, including the Security Council itself,⁷²⁹ despite the fact that the rebelling forces had gained a notable amount of territory and withheld it from the government for a long period of time.⁷³⁰

Finally, the effective control argument has been criticised for being much too stiff to serve the purposes of invited interventions, as its point-blank neutral stance might lead to undesirable outcomes. Although the strength of the effective control test does lie in its neutrality towards the host State's internal order, this same neutrality can result in foreign military support being delivered to oppressing or otherwise dictatorial actors.⁷³¹ Installing such governments to power would hardly serve the values of the international community, a task that intervention by invitation subtly aims to fulfil. Furthermore, it negates the option of offering support to democratic movements or even secessionist aspirations,

⁷²³ Ibid.

⁷²⁴ Ibid., pp. 991-992; Tom Ruys, Luca Ferro and Nele Verlinden, 'Digest of State Practice 1 July — 31 December 2015' (2016) 3 *Journal on the Use of Force and International Law* 126, pp. 154-155; Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, 15 October 2015, UN Doc. S/2015/792, Annex.

⁷²⁵ de Wet, 'Modern Practice of Intervention by Invitation', p. 997.

⁷²⁶ Ibid., pp. 996-997.

⁷²⁷ Mali, SC Res. 2085, Preamble and para. 9.

⁷²⁸ *Report of the Secretary-General on the Situation in Mali*, 26 March 2013, UN Doc. S/2013/189, para. 4; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 859.

⁷²⁹ Mali, SC Res. 2100, Preamble.

⁷³⁰ Ibid.; de Wet, 'Modern Practice of Intervention by Invitation', pp. 996-997.

⁷³¹ le Mon, 'Unilateral Intervention by Invitation', p. 745.

which often claim to champion global values. This has led to seeking alternative methods to recognise the representative of the host State.

2.1.3. The Challenger: The Qualification of Democratic Legitimacy

Due to the rigidity of the effective control test, some States have challenged it with an argument that stresses the democratic position of the inviting authority. This approach, which has managed to obtain some momentum, essentially proposes that democratic legitimacy should be used as the qualifying factor when determining the valid government of the host State.⁷³² Such arguments have been adopted by several militarily-prominent actors, most notably the United States.⁷³³ The very first hints of this strategy can be traced back to the Cold War and beyond, even the late 1800s, although the oldest of these US military operations tended to be covert and carefully kept out of the public eye.⁷³⁴ Still, in a more contemporary context, the country has continued to push for this argumentation, for example by trumping democratic legitimacy in its long-lasting ‘War on Terror’.⁷³⁵

However, the condition of democratic legitimacy is not without controversy. As opposed to the effective control test, its successful application inevitably requires the intervenor to pronounce upon the internal order of the host State.⁷³⁶ This can lead to governmental recognition, a practice that has been denounced by many members of the international community.⁷³⁷ Traditionally, States only recognise other States and leave their internal order at their own discretion.⁷³⁸ As this is the premise, adopting democratic legitimacy as the primary means of qualification would be a huge step, one that requires much State practice in order to be considered plausible.

Some practice does exist on the matter, but not in the form of strictly unilateral interventions. For instance, democratic legitimacy was successfully presented as a justification for a military intervention in 1994, when the Security Council decided to

⁷³² le Mon, ‘Unilateral Intervention by Invitation’, pp. 745-746; Fox, ‘Intervention by Invitation’, pp. 834-837.

⁷³³ Record of the Security Council’s 2491st Meeting, para. 74; Record of the Security Council’s 2902nd Meeting, pp. 8 and 14.

⁷³⁴ Wippman, ‘Pro-democratic Intervention by Invitation’, p. 293; Fox, ‘Intervention by Invitation’, p. 834.

⁷³⁵ This is evidenced by the continuing US practice of recognising and militarily supporting rebel groups, most recently in Syria, see Jethro Mullen, ‘US Airstrikes on ISIS in Syria: What You Need to Know’, *CNN News*, 24 September 2014, <edition.cnn.com/2014/09/23/world/meast/syria-isis-airstrikes-explainer>, and also de Wet, ‘Modern Practice of Intervention by Invitation’, p. 983.

⁷³⁶ de Wet, ‘Modern Practice of Intervention by Invitation’, pp. 982-984.

⁷³⁷ le Mon, ‘Unilateral Intervention by Invitation’, p. 744.

⁷³⁸ *Ibid.*, p. 744.

deploy collective armed measures over the situation in Haiti.⁷³⁹ The intervention came about after serious unrest in the country, which in 1991 had resulted in the ousting of President Aristide, who had been elected in an internationally monitored vote.⁷⁴⁰ Following his ousting by a military group, Aristide issued a plea for the international community to use any means, armed ones included, to restore order in Haiti.⁷⁴¹ At its meeting, various members of the Security Council deemed Aristide's ousting to be an outcome of an unlawful coup, which — they argued — still made him the legitimate representative of the State.⁷⁴² The Council hence authorised the use of force in Haiti to support Aristide's request, regardless of his *de facto* position and the observation that he had been ousted several years earlier.⁷⁴³

A partially similar situation later took place in Sierra Leone, when the elected President of the country was overthrown by an armed coup in 1997.⁷⁴⁴ Although he had fled the country, the Economic Community of West African States (ECOWAS) responded to President Kabbah's plea to intervene in the matter, attending to the opposing military forces and re-establishing the former order in early 1998.⁷⁴⁵ The Security Council, which had condemned the initial coup and deemed it a threat to international peace and security,⁷⁴⁶ welcomed this turn of events.⁷⁴⁷ The approval of the intervention was given even though Kabbah arguably no longer held effective control over Sierra Leone when he issued the invitation to intervene.⁷⁴⁸ This would again seem to suggest that effective control is not always the only criterion to identify the legitimate representative of the host State. In fact, the threshold appears to receive little to no attention in some cases.

The aforementioned military intervention in Mali has also shown signs of democratic legitimacy gaining more footing. As noted before, upon issuing the invitation, the Malian government had factually lost effective control over substantive portions of its territory.⁷⁴⁹ Hence, if the effective control argument was to be applied in its strictest form, the

⁷³⁹ Fox, 'Intervention by Invitation', pp. 385-386.

⁷⁴⁰ Ibid.

⁷⁴¹ Ibid.

⁷⁴² Record of the Security Council's 3413rd Meeting, 31 July 1994, UN Doc. S/PV.3413, pp. 4-5, 8, 12-14 and 23.

⁷⁴³ Ibid., pp. 2 and 12; *UN Mission in Haiti*, SC Res. 940, para. 4.

⁷⁴⁴ Record of the Security Council's 3822nd Meeting, 8 October 1997, UN Doc. S/PV.3822, pp. 3-4; Fox, 'Intervention by Invitation', p. 836.

⁷⁴⁵ Fox, 'Intervention by Invitation', p. 836.

⁷⁴⁶ *Sierra Leone*, SC Res. 1132, paras. 1, 3 and 8.

⁷⁴⁷ Statement by the President of the Security Council, 26 February 1998, UN Doc. S/PRST/1998/5; Fox, 'Intervention by Invitation', p. 386.

⁷⁴⁸ *Sierra Leone*, SC Res. 1132, para 1; Fox, 'Intervention by Invitation', p. 386; de Wet, 'Modern Practice of Intervention by Invitation', p. 985.

⁷⁴⁹ *Mali*, SC Res. 2100, Preamble; de Wet, 'Modern Practice of Intervention by Invitation', pp. 996-997; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 865.

government would have also lost its ability to invite foreign intervention.⁷⁵⁰ However, the French intervention was met with a positive reaction, especially from the Security Council which had been monitoring the Malian conflict since 2012.⁷⁵¹ Of course, the rebelling factions have been regarded as a terrorist organisation, which made support to the government the only plausible option.⁷⁵²

The international responses to democratic legitimacy have thus been ambiguous. On one hand, some interventions staged pursuant to this qualification have been accepted, even applauded.⁷⁵³ On the other hand, when it comes to pure intervention by invitation, there does not seem to be sufficient evidence on State practice that would suggest that democratic legitimacy has overthrown the effective control test as the primary mean of assessment.⁷⁵⁴ Moreover, the celebrated interventions in which democratic legitimacy was invoked had international elements in them, as in the military action in Haiti, Côte d'Ivoire and Sierra Leone.⁷⁵⁵ In all these cases it was the Security Council that took a stance on the internal orders of the aforementioned States: if individual States alone had decided on such matters, the response would have likely been more tense.⁷⁵⁶ The same premise applies to the current situation in Mali, which is being overseen *inter alia* by France and the Security Council.⁷⁵⁷ Without global observation such situations could result in one State deciding upon the internal political order of another, which would not be a sustainable outcome by international legal standards.⁷⁵⁸

Of course, the Security Council remains a political body, and has thus accordingly been inflicted with political issues: many of these problems concern the fact that the Council's powers have hardly been distributed evenly between the UN member States.⁷⁵⁹ In other words, the stamp of approval by the Council may be reassuring, but it does not automatically mean that the armed intervention and its purposes are free of the dubious elements often associated with unilateral governmental recognition. While this is true, the

⁷⁵⁰ de Wet, 'Modern Practice of Intervention by Invitation', pp. 996-997.

⁷⁵¹ *Ibid.*; *Mali*, SC Res. 2100, Preamble.

⁷⁵² Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 866.

⁷⁵³ Fox, 'Intervention by Invitation', pp. 835-837.

⁷⁵⁴ *Ibid.*, p. 837; Record of the Security Council's 7125th Meeting, pp. 4-7; Wiseheart, 'The Crisis in Ukraine', EJIL: *Talk!*, 4 March 2014.

⁷⁵⁵ Fox, 'Intervention by Invitation', pp. 836-837.

⁷⁵⁶ *Ibid.*, p. 837.

⁷⁵⁷ *Mali*, SC Res. 2100, Preamble and para. 7; *The Situation in Mali*, SC Res. 2295, 29 June 2016, UN Doc. S/RES/2295, Preamble and paras. 14 and 35; *Report of the Secretary-General on the Situation in Mali*, 26 March 2013, paras. 60-62 *Report of the Secretary-General on the Situation in Mali*, 10 June 2013, UN Doc. S/2013/338, paras. 18-19 and 83; *Report of the Secretary-General on the Situation in Mali*, 30 December 2016, UN Doc. S/2016/1137, paras. 1, 22 and 24-25.

⁷⁵⁸ Fox, 'Intervention by Invitation', p. 837.

⁷⁵⁹ UN Charter, Article 27(3); Dixon, *Textbook on International Law*, p. 345.

Council's active role in such matters is at least an attempt to follow the scheme initially intended by the Charter. Hence, the Security Council's involvement in recognising legitimate representatives is preferable but should not be viewed through rose-coloured glasses.

In any event, it would seem pertinent to conclude that the condition of democratic legitimacy may have found its way to military interventions, but only when an international element is involved.⁷⁶⁰ This denotes that either the United Nations or a regional organisation has taken a stance on the host State's legitimate representative, and has at least expressed its acceptance of the subsequent military intervention.⁷⁶¹ Conversely, using democratic legitimacy in an invited intervention between two individual States, with no collective involvement whatsoever, is much more problematic.⁷⁶²

Even without a collective element, the democratic legitimacy outlook could act as a healthy counterweight to the unbending effective control test. It would give the intervening States more flexibility when deciding upon an intervention: whether this is desirable is a matter of perspective. Still, this proposition sounds noble in theory, but its application in practice is hindered by several obstacles. Firstly, and perhaps most importantly, the outlook would require the intervening State to comment on the domestic politics of the host State, to probable dismay from the international community. As stated before, taking such stances could result in explicitly recognising governments, which is controversial amongst various States.⁷⁶³ Secondly, there is a high chance of third States recognising and aiding foreign governments that suit their own interests, a scenario which has already presented itself in practice.⁷⁶⁴

Despite these concerns, some members of the international community have continued to use democratic legitimacy as a legal justification during military interventions in which the United Nations or regional organisations have not taken a direct stance.⁷⁶⁵ In fact, the failures of these organisations have provided fertile ground for the use of the democratic legitimacy qualification.⁷⁶⁶ These activities have included the use of force in modern contexts, including but not limited to the fight against terrorism.⁷⁶⁷ In the most recent

⁷⁶⁰ Fox, 'Intervention by Invitation', p. 837.

⁷⁶¹ Ibid.

⁷⁶² Ibid.

⁷⁶³ le Mon, 'Unilateral Intervention by Invitation', pp. 744-746; P.K Menon, 'Some Thoughts About the Law of Recognition' (1991) 87 *Sri Lanka Journal of International Law* 3, p. 94.

⁷⁶⁴ *Inter alia* Record of the Security Council's 2902nd Meeting, pp. 7-8 and Record of the Security Council's 7125th Meeting, pp. 3-4.

⁷⁶⁵ de Wet, 'Modern Practice of Intervention by Invitation', p. 983.

⁷⁶⁶ Fox, 'Intervention by Invitation', p. 838.

⁷⁶⁷ Ibid.; Henderson, 'Editorial Comment', pp. 212-213.

years this scenario has been put to use in Iraq and Syria,⁷⁶⁸ where the terrorist organisation ISIS has been gaining territory over other factions engaged in the civil wars of these countries.

Syria in particular has become the centre of attention from many perspectives, including intervention by invitation and democratic legitimacy.⁷⁶⁹ As the Security Council has continued to fail in finding a suitable response to the crisis, individual States have taken up the mantle and decided to intervene unilaterally in favour of one of the many factions. The United States and Russia have both now publicly pledged their support to a portion of the rebels and al-Assad's government respectively,⁷⁷⁰ which once again highlights how differently countries might view the very same situation. Given the sheer chaos that has engulfed Syria at this point, using the effective control test to identify the legitimate representative would be rather futile. It seems that the States intervening in the conflict have recognised this and have resorted to rhetoric more reminiscent of the democratic legitimacy qualification.⁷⁷¹

As this matter chiefly concerns non-international armed conflicts, it will be further analysed later in the thesis.⁷⁷² However, it can be noted that as in the Syrian crisis, the threshold of democratic legitimacy may offer a way out of certain impasses created by the limitations of the effective control test. This is particularly true if the situation in question concerns commonly held values and interests. Still, this strength does not immediately denote that it ultimately prevails as the qualification for the inviting government, especially since the matter is multifaceted in nature.

2.1.4. Effective Control Versus Democratic Legitimacy: The Current Struggle

Although the qualification of democratic legitimacy has thus far found most of its success in interventions either authorised or approved by the Security Council, the criteria could perhaps prevail outside this context as well. After all, international law is an ever-evolving set of rules. This holds true for democratic legitimacy, too: some States have already used it in unilateral interventions, which has been interpreted as an attempt to challenge the effective control test. However, making sense of State practice on this matter is difficult, as the members of the international community seem to change their opinions frequently.

⁷⁶⁸ de Wet, 'Modern Practice of Intervention by Invitation', p. 983; Fox, 'Intervention by Invitation', p. 838.

⁷⁶⁹ Fox, 'Intervention by Invitation', p. 838; Henderson, 'Editorial Comment', p. 213.

⁷⁷⁰ Tim Lister, 'Russia's Syria Expedition: Why Now and What's Next?', *CNN News*, 1 October 2015, <edition.cnn.com/2015/09/27/world/russia-syria-involvement>.

⁷⁷¹ Henderson, 'Editorial Comment', p. 213.

⁷⁷² See Section 3.2. of this chapter.

This dilemma has been recently put into practice in the Ukraine crisis, which began to gain major international attention in 2013 as internal unrest.⁷⁷³ By 2014 the situation had escalated fast, leading to the *de facto* ousting of then-President Yanukovich, who would flee to Russia following the regime change in Ukraine.⁷⁷⁴ However, the ousted President refused to go quietly. In March 2014 he purportedly issued a plea for military intervention to Russia, which quickly responded to the invitation and publicly sent its troops to the Crimean Peninsula.⁷⁷⁵ Russia would then go on to present Yanukovich's invitation as the partial justification for its military activities before the Security Council, to predominantly negative reactions from its fellow member States.⁷⁷⁶

The status of Yanukovich as the legitimate representative of Ukraine sparked debate between Russia and various Western States during the Security Council meeting. The United States in particular argued that since Yanukovich had fled the Ukrainian territory and the power in the country had been allocated to a new government, his status was no longer such that he could issue a valid invitation for a military intervention.⁷⁷⁷ Several other States echoed these statements, either explicitly or by noting that Russia had no grounds for its use of force.⁷⁷⁸ Russia refuted the argument by claiming that despite his loss of control over the Ukrainian territory, Yanukovich was still the democratically elected representative of the State.⁷⁷⁹

Furthermore, Russia asserted that Yanukovich's ousting had been unlawful, describing the new government in Kiev as the result of an illegitimate coup.⁷⁸⁰ Consequently, it held that the President's invitation for a military invitation was still valid under international law.⁷⁸¹ Although most members of the Security Council rebutted Russia's arguments, the organ was unable to adopt a Resolution on the matter due to Russia's veto. Soon after the Security Council meeting, Russia forcefully annexed Crimea from Ukraine, an act derided by most of the international community.⁷⁸²

⁷⁷³ For previous argumentation on the matter, see Tuura, 'Intervention by Invitation and the Principle of Self-Determination', pp. 215-218.

⁷⁷⁴ BBC, 'Ukraine Crisis - Timeline', *BBC News*, 13 November 2014, <www.bbc.com/news/world-middle-east-26248275>; BBC, 'Ukraine country profile - overview', *BBC News*, 3 August 2017 <www.bbc.com/news/world-europe-18018002>.

⁷⁷⁵ Record of the Security Council's 7125th Meeting, pp. 3-4.

⁷⁷⁶ *Ibid.*, pp. 4-15.

⁷⁷⁷ *Ibid.*, p. 18.

⁷⁷⁸ *Ibid.*, pp. 6-8, 10, 12-13 and 14.

⁷⁷⁹ *Ibid.*, pp. 3-4 and 16. Of course, it could also be claimed that Yanukovich was entitled to invite an intervention due to the presumption that legitimate representatives do not immediately lose effective control following their deposal, see Section 2.1.2. of this chapter.

⁷⁸⁰ *Ibid.*, p. 16.

⁷⁸¹ *Ibid.*

⁷⁸² *Territorial Integrity of Ukraine*, paras. 5-6; de Wet, 'Modern Practice of Intervention by Invitation', p. 989.

Although the Security Council was unable to reach a decision on the matter, only a handful of States have recognised the Russian intervention as legitimate.⁷⁸³ This would seem to suggest that the effective control argument still holds its position as the mean of assessing the legitimate representative of a State. Nevertheless, one cannot forget the political implications and their effect on the responses discussed here. For example, the United States itself has justified its own military activities on a doctrine that heavily relies on democratic legitimacy instead of effective control.⁷⁸⁴ Russia seemed to retreat from its previous statements as well, since in the past it has discarded invitations from the supposedly democratically legitimate representative of the host State.⁷⁸⁵ This standoff once again proves the two-faced nature of international relations, as States change their opinions on legal norms to follow purely political motives.

This situation is even further highlighted by another major invited intervention, initiated in Yemen in early 2015. Following a rebel takeover that had been building for months,⁷⁸⁶ Yemen issued a plea for foreign intervention on its territory.⁷⁸⁷ A Saudi-led coalition responded in kind, having now intervened in the on-going Yemen Civil War.⁷⁸⁸ As noted by commentators, the invitation came from the Yemeni President, a potentially legitimate representative of the host State;⁷⁸⁹ however, at that time he had fled from Yemen to Saudi Arabia, a situation reminiscent of the one in Ukraine.⁷⁹⁰ Unlike Yanukovych and Ukraine, the intervening States had no trouble with this fact. It would appear that at least the United States has argued that the situations of Yemen and Ukraine are different.⁷⁹¹ This could indicate that the US does not contest the effective control test in favour of democratic legitimacy — at least in this case — but rather argues that the particular contexts differ.⁷⁹² And indeed, the case of Yemen does bear a component of

⁷⁸³ *Territorial Integrity of Ukraine*, Preamble and paras. 1-2.

⁷⁸⁴ Record of the Security Council's 2491st Meeting, para. 74; Record of the Security Council's 2902nd Meeting, p. 8.

⁷⁸⁵ Record of the Security Council's 2491st Meeting, paras. 418-428; Record of the Security Council's 2902nd Meeting, pp. 23-26.

⁷⁸⁶ Tom Ruys, Nele Verlinden and Luca Ferro, 'Digest of State Practice, I January — 30 June 2015' (2015) 2 *Journal on the Use of Force and International Law* 257, p. 272.

⁷⁸⁷ Identical letters dated 26 March 2015 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council, 27 March 2015, UN Doc. S/2015/217, Enclosure.

⁷⁸⁸ Vermeer, 'The Jus Ad Bellum and the Airstrikes in Yemen', *EJIL: Talk!*, 30 April 2015; Ruys, Verlinden and Ferro, 'Digest of State Practice, I January — 30 June 2015', p. 273.

⁷⁸⁹ Ruys, Verlinden and Ferro, 'Digest of State Practice, I January — 30 June 2015', p. 273.

⁷⁹⁰ Vermeer, 'The Jus Ad Bellum and the Airstrikes in Yemen', *EJIL: Talk!*, 30 April 2015; Ashley Deeks, 'International Legal Justification for the Yemen Intervention: Blink and Miss It', *Lawfare*, 30 March 2015, <www.lawfareblog.com/international-legal-justification-yemen-intervention-blink-and-miss-it>.

⁷⁹¹ Vermeer, 'The Jus Ad Bellum and the Airstrikes in Yemen', *EJIL: Talk!*, 30 April 2015.

⁷⁹² *Ibid.*

collectivity, for the Security Council has previously denounced the actions of the insurgents.⁷⁹³ Still, given the United States' past support for the democratic legitimacy principle,⁷⁹⁴ its stance on the matter should be taken with a grain of salt.

These developments, which essentially took place over the course of one year, show that examining State practice on intervention by invitation can quickly lead to impasses. If one takes the actions and opinions of States without consideration of the political circumstances and agendas behind them, no definite conclusions can be drawn. This premise affects both the effective control test and the qualification of democratic legitimacy. In any event, given the sporadic and contradicting practice, it can be argued that the qualification of democratic legitimacy has not yet gained enough momentum to have emerged as an equal to the effective control test, let alone completely overthrow it.⁷⁹⁵ As effective control has been the premise for evaluation thus far, it must continue in this position given the lack of coherent evidence proving otherwise.⁷⁹⁶

However, while democratic legitimacy may not be an ideal stand-alone mean of assessing the legitimacy of the inviting authority, it may find its place among other conditions of intervention by invitation. It may also find success in invited interventions which are applied side by side with collective measures or intent.⁷⁹⁷ One such possibility concerns the deployment of consensual use of force in order to combat terrorist organisations, rather than to attend to purely internal matters of the host State.⁷⁹⁸ Consequently, the element of collectivity may soothe the concerns over possible interference into the host State's internal matters, making the use of the democratic legitimacy requirement at least slightly smoother.⁷⁹⁹

2.1.5. Final Remarks: Balancing Effective Control and Democratic Legitimacy

While far from being completely uncontested, the effective control test still holds its position in today's international law. Although the test has many notable shortcomings, its application allows for a neutral means of assessment, which is appreciated by the majority of the international community and commentators. Still, the condition of

⁷⁹³ Ibid.; *Middle East (Yemen)*, SC Res. 2201, 15 February 2015, UN Doc. S/RES/2201, Preamble and para. 1; Record of the Security Council's 7382nd Meeting, 15 February 2015, UN Doc. S/PV.7382, p. 2. However, it can be observed that as the civil war has continued, with mounting controversy, the Council's support for the government has become less pronounced, see *inter alia* *The Situation in the Middle East*, SC Res. 2342, 23 February 2017, UN Doc. S/RES/2342, Preamble.

⁷⁹⁴ *Inter alia* Record of the Security Council's 2902nd Meeting, pp. 7-8.

⁷⁹⁵ de Wet, 'Modern Practice of Intervention by Invitation', p. 990.

⁷⁹⁶ Ibid.; Green, 'Editorial Comment', pp. 6-7.

⁷⁹⁷ Fox, 'Intervention by Invitation', p. 837.

⁷⁹⁸ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 866.

⁷⁹⁹ Fox, 'Intervention by Invitation', p. 837.

democratic legitimacy has gained sporadic momentum, especially when interventions are successfully applied in civil wars. This can be attributed to the more prominent status of the right to self-determination, which stresses the right of people to take part and choose their political representatives. However, democratic legitimacy is a notion that should be put into practice with caution, and therefore it cannot be the stand-alone qualification to determining the effective government of the host State.

Perhaps the most sustainable outlook would be to combine the principle of self-determination with the effective control test. This way the evaluation of the valid government would still have the neutral conditions presented in effective control but would also require upholding of the self-determination of the peoples. Another option is simply to refrain from intervening if doing so may result in the violation of the principle. In any event, democratic legitimacy alone cannot act as the mean of examining the authority of the inviting establishment: doing so would inevitably lead to frequently recognising governments, which would contravene the current State practice.

Consequently, thus far successful applications of the democratic legitimacy principle have required international assurances.⁸⁰⁰ In these cases the legal representative's position has been recognised either by the majority of States or in conjunction with action authorised by the Security Council.⁸⁰¹ The qualification's application in a situation without such flavours seems unlikely to receive an enthusiastic response, at least at this stage. Furthermore, democratic legitimacy is a qualification that has only been enacted in particular situations only and is thus yet to receive universal following.

This lack of universal following might be due to conflicting opinions as to the exact meaning of democratic legitimacy. In other words, there is no clear definition of the notion. Since the only discernible condition is that a representative must somehow encompass the democratic will of the State, establishing common and immediately applicable values on the matter appears difficult. After all, a healthy democracy depends on the existence of different opinions, not universal consensus. Thus, the process on crystallising the notion of democratic legitimacy appears to be in a loop, where juxtaposing takes are presented without the hope of reaching a conclusion.

In contrast, the effective control test, through its mechanical measures, offers the participants of the global community some much needed mutual ground. It does not solve, or even seek to solve, the conundrums created by opposing opinions, since it allows States to keep their stances on the target State's internal democratic order. Overall, this position continues to be a positive one, despite containing certain drawbacks.

⁸⁰⁰ Ibid.

⁸⁰¹ Ibid., pp. 835-837.

2.2. Procedural Conditions for the Invitation: Issuing the Invitation to Intervene

2.2.1. General Procedural Matters Concerning the Invitation

Simply identifying the government is not enough when assessing an invitation to intervene. One must also make sure that the invitation follows procedural conditions, which safeguard the legitimacy of the consent given by the host State.⁸⁰² As the name suggests, they aim to ensure that the consent is given procedurally in accordance with international law. The consent must thus be issued in a sufficient form, which reflects the sovereign will of the host State while staying within the boundaries set by international law.⁸⁰³ In particular, the procedural conditions determine if the consent has been issued clearly enough to validate a military intervention: given the frequent use of coercion in interventions by invitation, this is of particular importance.⁸⁰⁴

This is where once again we encounter the flexibility of invited interventions and the problems it can cause. The use of force at the request of the host State can take many forms, from barely noticeable operations to full-scale armed interventions.⁸⁰⁵ The variety of options is also reflected in the way the host State may issue its consent: the most noteworthy condition is that few definite ones exist. This means that consent to intervention in most cases may be issued without having to follow a particular procedure. As a result, invitation may be given either *ad hoc* or via a treaty, and both procedures are perfectly valid.⁸⁰⁶ Still, two main requirements apply to all invited interventions, regardless of the manner in which the consent was given. Every intervention by invitation, whether pursued *ad hoc* or in response to a treaty, must fulfil these requirements to be considered valid. In addition, certain technical considerations come into play and the failure to follow them may render the intervention unlawful.

First and foremost, as with any agreement, the host State must be allowed to give its consent freely.⁸⁰⁷ The invitation cannot be a result of coercion, fraud or duress of any kind: if this is the case, it cannot be regarded as an actual expression of the State's real will.⁸⁰⁸ In turn, the lack of real will renders compliance with other procedural conditions irrelevant, as the use of force remains illegal. In other words, the invitation of the host

⁸⁰² Liebllich, 'Intervention and Consent', p. 341.

⁸⁰³ *Ibid.*

⁸⁰⁴ *Ibid.*; Crawford, International Law Commission's Articles, pp. 163-164; Wippman, 'Military Intervention', p. 211.

⁸⁰⁵ Jennings and Watts, Oppenheim, pp. 435-436; *Nicaragua*, para. 195.

⁸⁰⁶ Wippman, 'Treaty-based Intervention', p. 612; *DCR v. Uganda*, paras. 46-47.

⁸⁰⁷ Crawford, International Law Commission's Articles, pp. 163-164.

⁸⁰⁸ *Ibid.*; Ronzitti, 'Use of Force, Jus Cogens and State Consent', p. 148; Cassese, International Law, p. 370; Vienna Convention on the Law of Treaties, Articles 49 and 51-52.

State must be genuine, and if any foul play is suspected, it deprives the validity of the subsequent intervention.⁸⁰⁹

This matter, although obvious, has not been without significance in past practice. Many invited interventions, especially those executed during the Cold War, were marked with doubt over whether the intervention was pursuing the genuine consent of the host State's government. This was notably the case with USSR intervention in Afghanistan (1979), which factually resulted in the deposal and execution of the supposed inviter, evoking doubts that the military measures were forced upon the Afghan government instead.⁸¹⁰ However, the issue of contestable consent is not limited to Cold War rhetoric. Even the contemporary practice of intervention by invitation — the targeted killings by the United States in particular, as well as its presence in Iraq following the 2003 invasion — steadily showcase similar problems.⁸¹¹

Second, the genuineness of the consent can be linked to the following condition, which requires the invitation to be issued clearly.⁸¹² Clarity acts as the element which cleanses the armed intervention of the presumption of ill intent, therefore making the invitation effectively valid.⁸¹³ The base of this condition is the base framework of international relations itself. No limitation on a State's sovereignty, in particular over its territory, can be assumed,⁸¹⁴ a premise which holds true for intervention by invitation as well.⁸¹⁵ Thus, the intervening State must ensure that the invitation is clearly expressed before an intervention can commence. However, if the consent is freely and clearly given, either the host State or the intervenor can initiate the negotiations on the intervention. Of course, since the concept is called intervention by *invitation*, the preferable option would be an active host State, in particular due to the political conundrums that tend to come along.

The two core requirements of genuine consent and clarity lead us to the technical matters concerning the invitation. In reflection with the ability to choose between *ad hoc* and treaty-based interventions, there are no specific requirements for the technical form of the invitation, leaving States with considerable leeway. This means that the invitation may be given in written or oral form; obviously, should the invitation be treaty-based,

⁸⁰⁹ Byrne, 'Consent and the Use of Force', p. 104.

⁸¹⁰ Record of the Security Council's 2190th Meeting, paras. 12 and 39.

⁸¹¹ Brian D. Shekell, 'The Legality of the United States' Use of Targeted Killings In the War Against Terror' (2011) 57 *The Wayne Law Review* 313, pp. 324-325; Lieblich, 'Intervention and Consent', p. 341.

⁸¹² Byrne, 'Consent and the Use of Force', p. 104.

⁸¹³ Tanca, *Foreign Armed Intervention*, p. 15; Crawford, *International Law Commission's Articles*, pp. 163-164; Byrne, 'Consent and the Use of Force', pp. 104-105.

⁸¹⁴ *The Case of the S.S. Lotus*, Series A, No. 10 (1927), p. 18; *Island of Palmas Case* (Netherlands v. the United States of America), 1928 2 RIAA 829, p. 838.

⁸¹⁵ Tanca, *Foreign Armed Intervention*, p. 15.

written consent is required.⁸¹⁶ Of the two options, one might prefer a written invitation since it is more easily evidenced. Nevertheless, as long as the consent is clearly expressed, either form is valid. Furthermore, it has been suggested that the host State may issue the invitation either explicitly or tacitly.⁸¹⁷ However, tacit consent is problematic from the viewpoint of clarity, as it may not sufficiently manifest the sovereign will of the host State to invite foreign intervention: instead, it may have simply decided to adhere to an intervention under duress.⁸¹⁸

The conditions concerning timeframes have traditionally been more strict, for the invitation must be issued before or at latest during the intervention.⁸¹⁹ Retroactively retrieved consent is invalid, and will not legitimise the armed intervention it was sought for.⁸²⁰ However, an invitation issued during the intervention itself is not without issues: in such a case, the host State may be under duress to accept the intervention, not to mention that in any event, the beginning of the intervention will have lacked proper consent. Hence, the best approach would be to give the invitation before the intervention, unless the situation is exceptional: an example could be circumstances similar to hot pursuit, when an armed intervention must cross into another State's territory quickly and unexpectedly.

Certain conditions concerning the scope of the invitation must be fulfilled as well. While the host State's government is allowed to invite foreign military intervention, it may only consent to armed measures that are within the scope of its powers.⁸²¹ In other words, the government may only act according to the capacity given to it by the constitutional order of the host State: hence it may not legitimise military actions that could *inter alia* lead to the occupation or annexation of the State's territory, or acts that deter the human rights or self-determination of its people.⁸²² This naturally poses some problematic limitations, since the use of military force is always bound to have undesirable consequences.⁸²³ Furthermore, the mere need to invite armed intervention always signals the presence of a crisis, perhaps even a full-scale breakdown of societal

⁸¹⁶ Lieblich, 'Intervention and Consent', pp. 357-358 and 362.

⁸¹⁷ *Ibid.*, p. 349.

⁸¹⁸ Crawford, International Law Commission's Articles, p. 164.

⁸¹⁹ Ronzitti, 'Use of Force, Jus Cogens and State Consent', p. 160; Crawford, International Law Commission's Articles, p. 163.

⁸²⁰ Ronzitti, 'Use of Force, Jus Cogens and State Consent', p. 160; Crawford, International Law Commission's Articles, p. 163.

⁸²¹ Cassese, International Law, p. 371.

⁸²² *Ibid.*; *Friendly Relations*, Principles I, III and V.

⁸²³ UN Charter, Preamble.

order.⁸²⁴ Invited intervention is thus always laced with danger, in particular from the perspective of the right to self-determination.⁸²⁵

These findings immediately correspond to the position of peremptory rules during invited interventions. No matter what the mode of the invitation is, it must always leave the norms of *ius cogens* and *erga omnes* intact.⁸²⁶ This is due to the legal constraints on the consent of the host State: the invitation only validates the use of force between the host State and the intervenor,⁸²⁷ whereas the rules of *ius cogens* and *erga omnes* are pieces of international law that are owed towards all members of the international community.⁸²⁸ The violations of these norms concern all States: in other words, they cannot be effectively forfeited in an invitation to intervene militarily, or in any treaty or agreement for that matter.⁸²⁹ In addition, *ius cogens* rules take normative primacy under international law, making any agreement in their contradiction void.⁸³⁰

The conditions entailed above, varied as they may be, should apply to all invitations which result in an armed intervention on the host State's territory. They are pertinent regardless of the manner in which the invitation to intervene is sought. However, invitations given *ad hoc* or via a long-standing treaty can include certain special elements, which will be discussed next.

2.2.2. The Preferred Premise of *Ad Hoc* Interventions

When intervening upon request, the consent of the host State can be retrieved in many manners. Since few firm legal limitations exist in this field, such a stance has been regarded as permissible. However, even though the general requirements regarding form have been quite lenient, it has still been suggested that an invitation to intervene is best issued on an *ad hoc* basis.⁸³¹

⁸²⁴ Fox, 'Intervention by Invitation', p. 817.

⁸²⁵ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', pp. 861-862; Cassese, International Law, p. 371.

⁸²⁶ Ronzitti, 'Use of Force, Jus Cogens and State Consent', p. 149; Cassese, International Law, p. 371.

⁸²⁷ Tanca, Foreign Armed Intervention, pp. 20-21; Brownlie, International Law and the Use of Force, p. 327.

⁸²⁸ Tanca, Foreign Armed Intervention, pp. 20-21; Cassese, International Law, p. 371. Moreover, given that an armed intervention may violate the UN Charter, obligations *erga omnes partes* could be regarded pertinent as well. However, given that general *erga omnes* obligations are applicable, they have been given more focus.

⁸²⁹ Cassese, International Law, p. 371; Vienna Convention on the Law of Treaties, Articles 53 and 64; Lieblich, 'Intervention and Consent', p. 364.

⁸³⁰ Vienna Convention on the Law of Treaties, Articles 53 and 64.

⁸³¹ Cassese, International Law, p. 371; Wippman, 'Treaty-based Intervention', p. 612.

Several reasons support this preference of *ad hoc* invitations. Firstly, retrieving the consent in such manner is the most fool-proof method of ensuring that the host State agrees to the intervention, and that the invitation truly reflects the sovereign will of the State.⁸³² Secondly, when an invitation is given *ad hoc*, it can be modified to accommodate the needs of the specific intervention, meaning that political circumstances and other pertinent matters can be taken into account more effectively.⁸³³ Thirdly, consenting to interventions on an *ad hoc* basis minimises the element of surprise: as will later be explained, treaty-based interventions can be put into practice in previously unimaginable and unexpected circumstances, which makes foreseeing their actual effects very difficult.⁸³⁴

The claims detailed here do not mean that *ad hoc* intervention by invitation is perpetually free of unprecedented events. No form of armed force can never be planned perfectly, meaning that initial plans and actual practice may collide. Still, *ad hoc* interventions tend to be slightly easier to predict as opposed to treaty-based consent, which is often given more generally and thus more vaguely. As a result, many commentators have held that invited interventions should be at least partially *ad hoc* in nature.⁸³⁵ This stance has been reflected in State practice as well, to a certain extent at least. For instance, even some invited interventions that could legally have been based upon treaties alone have also had *ad hoc* consent on the side for safekeeping.⁸³⁶

Still, completely treaty-based interventions are no oddity in international relations, since at times it may be impossible or otherwise unwise to seek *ad hoc* consent. Certain military operations may require a long-term presence of the intervening State and may therefore have to be regulated through a treaty rather than through *ad hoc* intervention. This was the case with the presence of the United States and its coalition forces in Iraq following the initial war in 2003.⁸³⁷ If the War on Iraq was complex in a legal sense, the same can be said of the manner in which the subsequent presence of multinational troops on Iraqi soil was regulated.⁸³⁸ The measures exhausted included actions under Chapter VII of the Charter and continuously revised invitations from the Iraqi authorities, thus

⁸³² Cassese, *International Law*, pp. 370-371; Wippman, 'Treaty-based Intervention', pp. 611-612.

⁸³³ Wippman, 'Treaty-based Intervention', pp. 612 and 684-685.

⁸³⁴ An example of such difficulties with treaty-based interventions is the 1960 Cyprus Treaty of Guarantee, see Wippman, 'Treaty-Based Intervention', pp. 635-637.

⁸³⁵ *Ibid.*, p. 612; Cassese, *International Law*, pp. 370-371.

⁸³⁶ Cassese, *International Law*, pp. 370-371; Record of the Security Council's 2902nd Meeting, pp. 8 and 14; le Mon, 'Unilateral Intervention by Invitation', pp. 778-782.

⁸³⁷ Lieblich, 'Intervention and Consent', pp. 340-341.

⁸³⁸ *Ibid.*

dragging along an *ad hoc* element.⁸³⁹ However, towards the end of the US military presence, the stationing and functioning of said troops was regulated via a specific treaty between Iraq and the United States, which included clear provisions on the scope and length of the military activities.⁸⁴⁰ In this case, a treaty was important, since the military presence in the host State's territory spanned over several years, necessitating a long-standing legal instrument which the States involved could consult.⁸⁴¹ In other words, pure *ad hoc* consent could have proved insufficient given the circumstances involved.⁸⁴²

Certain additional issues concerning *ad hoc* consent exist as well. Sometimes the conditions of *ad hoc* interventions are not very well-defined: such a scenario may be realised when the intervention has been called upon very quickly and unexpectedly. If consent is only given during the situation's escalation, the intervenor and host State may be unable to regulate the armed intervention at hand effectively. Hence, some States have opted to set out legal frameworks for invited interventions beforehand by negotiating upon treaties, which may then be invoked in the face of a crisis.

2.2.3. Conditions in Treaty-based Interventions

Although some prefer invitations to be given *ad hoc*, many interventions based on consent have at least partly been pursued on the basis of a prior treaty.⁸⁴³ In purely legal terms, this premise is perfectly acceptable: the invitation to intervene is not subject to follow a particular technical procedure, leaving room for treaty-based interventions as well.⁸⁴⁴ Moreover, treaties allowing the deployment of foreign troops do not violate the sovereignty of the host State, as in their sovereign capacity any State is entitled to ratify a treaty that allows such use of force.⁸⁴⁵ This is based upon the findings of the *S.S. Wimbledon* case (1923): the ability to enter into international agreements is in itself a

⁸³⁹ *Situation Between Iraq and Kuwait*, SC Res. 1546, 8 June 2004, UN Doc. S/RES/1546, paras. 9-12 and Annex; *Iraq*, SC Res. 1637, 8 November 2005, UN Doc. S/RES/1637, para. 1 and Annex I; *Iraq*, SC Res. 1723, 28 November 2006, UN Doc. S/RES/1723, para. 1 and Annex I; *Iraq*, SC Res. 1790, 18 December 2007, UN Doc. S/RES/1790, para. 1 and Annex I; Liebllich, 'Intervention and Consent', p. 340.

⁸⁴⁰ Agreement on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq (17 November 2008, in force 27 November 2008), KAV 8551, Articles 1, 4, 24 and 30.

⁸⁴¹ In accordance with the terms of the Agreement, the United States withdrew its troops from Iraq in December 2011, only to return a couple of years later to combat a new terrorist threat, see Henderson, 'Editorial Comment', pp. 209-210.

⁸⁴² Of course, the treaty had a limited duration, resulting in it being free of many issues often attributed to treaty-based invited interventions.

⁸⁴³ le Mon, 'Unilateral Intervention by Invitation', pp. 778-785, Wippman, 'Treaty-based Intervention', pp. 635-637 and 680-684; Cassese, *International Law*, p. 370.

⁸⁴⁴ Wippman, 'Treaty-based Intervention', p. 612.

⁸⁴⁵ *Ibid.*, p. 616.

manifestation of State sovereignty.⁸⁴⁶ The commitments that arise from those agreements cannot hence be interpreted as violations of the contracting party's sovereignty, either.⁸⁴⁷ The same principle applies to treaties regulating the use of force in a State's territory.⁸⁴⁸ This has led to several agreements of this kind being adopted, with examples including the 1977 Panama Canal Treaty and the 1987 Indo—Sri Lanka Accord.⁸⁴⁹

However, it is well-acknowledged that these types of treaties are special in nature and may thus require equally special interpretation and limitations.⁸⁵⁰ For one, no treaty, be it bilateral or multilateral, may violate norms of *ius cogens* or contradict the UN Charter.⁸⁵¹ This premise does not entirely make a treaty allowing the use of force on another State's territory void: as long as the treaty is a result of the host State's genuine sovereign will, the agreement can be invoked as a legal basis for military measures. However, it has been held that such a treaty cannot act as an irrevocable blanket of authorisation that lasts indefinitely: the host State, in its sovereign capacity, must always be able to retract its consent.⁸⁵² As soon as the real-time consent of the territorial State ceases to exist, so does the legitimisation of the use of force in its territory: any use of force against another State will inevitably lead to violations of both the norms of *ius cogens* and Article 2(4) of the Charter.⁸⁵³ Hence, real-time State consent will always overcome the consent presented in a prior treaty, even if the treaty is otherwise valid.⁸⁵⁴

This right of retraction is important, since when States negotiate treaties, they obviously cannot do so with a crystal ball. This means that some clauses of treaties are realised in completely different circumstances than imagined during the finalisation of the treaty. And indeed, here the forward-looking nature of treaty-based intervention presents a problem. Any foreign military intrusion is best executed on a case-by-case basis, since this is the most secure method when it comes to effectively honouring the host State's sovereignty:⁸⁵⁵ as history has shown us, a long-standing military presence

⁸⁴⁶ *The Case of the S.S. Wimbledon*, Series A, No. 1 (1923), p. 25.

⁸⁴⁷ *Ibid.*

⁸⁴⁸ Brownlie, *International Law and the Use of Force*, p. 321.

⁸⁴⁹ Cassese, *International Law*, p. 370; Gunewardene, 'Indo—Sri Lanka Accord: Invitation or Intervention?', pp. 173 and 177.

⁸⁵⁰ Wippman, 'Treaty-Based Intervention', pp. 684-685.

⁸⁵¹ Vienna Convention on the Law of Treaties, Articles 53 and 64; UN Charter, Article 103.

⁸⁵² Wippman, 'Treaty-Based Intervention', p. 631; Institut de Droit International, *Present Problems of the Use of Force in International Law*, Tenth Commission — Sub-Group C Resolution (10 RES-C EN PLENIERE), 8 September 2011, Article 5.

⁸⁵³ Wippman, 'Treaty-based Intervention', p. 631.

⁸⁵⁴ *Ibid.*; Institut de Droit International, Sub-Group C Resolution (10 RES-C EN PLENIERE), Article 5.

⁸⁵⁵ Wippman, 'Treaty-Based Intervention', p. 612; Cassese, *International Law*, p. 371.

can lead to problems, in the worst case even occupation.⁸⁵⁶ The threat of this scenario definitely holds true for invited interventions as well. Moreover, treaties are completed with long-term goals in mind. This means that the provisions of such agreements may affect the future governments of the contracting parties and therefore limit their competence to carve out the political path of their own.⁸⁵⁷ This issue is present in all international agreements, but it is more prominent in treaties that allow the use of force on a State's territory: such agreements are peculiar in nature, and thus they might bind the future governments of the contracting States too tightly.⁸⁵⁸

The United States intervention in Panama in 1989 is an often-cited example of a treaty-based intervention gone wrong. The two States had concluded the aforementioned 1977 Panama Canal Treaty, which contained a provision enabling the US use of force on Panama's territory in the event of certain threats in the Canal or other similar violations.⁸⁵⁹ Although Panama had previously accepted the provisions of the treaty, it later denounced the clause permitting the use of force on its territory, claiming that any military activities could only be executed upon specific request.⁸⁶⁰ Nevertheless, in December 1989 the United States began its military intervention in Panama, with one of its goals being the capture and arrest of General Noriega, who was globally viewed as the dictator of Panama.⁸⁶¹

The intervention was partially based upon the consent of the host State,⁸⁶² of both *ad hoc* and treaty-based nature.⁸⁶³ In addition to the 1977 Treaty, the United States held that it had extracted consent from what it called the legitimate representative of Panama, a new alternative government which had assumed its position at a US military base mere moments before the commencement of the intervention.⁸⁶⁴ Although the Security Council Resolution on the matter was blocked due to the use of veto by three permanent member

⁸⁵⁶ Brownlie, *International Law and the Use of Force*, p. 317; *Territorial Integrity of Ukraine*, paras. 1-6.

⁸⁵⁷ Wippman, 'Treaty-based Intervention', pp. 630-632.

⁸⁵⁸ *Ibid.*; Lieblich, 'Intervention and Consent', pp. 368-369.

⁸⁵⁹ Cassese, *International Law*, p. 370; Wippman, 'Treaty-based Intervention', p. 681.

⁸⁶⁰ Cassese, *International Law*, p. 370.

⁸⁶¹ *Ibid.*; Record of the Security Council's 2902nd Meeting, pp. 11-14; Janet Kellet Cramer, "'Just Cause' or Just Politics — U.S. Panama Invasion and Standardizing Qualitative Tests for Diversionary War' (2006) 32 *Armed Forces & Society* 178, p. 178.

⁸⁶² Although, one should note that the US argued self-defence as well, see Kellet Cramer, "'Just Cause' or Just Politics', p. 188.

⁸⁶³ Record of the Security Council's 2902nd Meeting, p. 8.

⁸⁶⁴ *Ibid.*, pp. 7-8; Tanca, *Foreign Armed Intervention*, pp. 183-184; Cassese, *International Law*, p. 370.

States,⁸⁶⁵ the General Assembly condemned the intervention.⁸⁶⁶ However, it has been noted that the General Assembly Resolution on the matter shows deep division between Western States and the rest of the world: while many Western nations disagreed with certain judicial aspects of the US military activities, they still valued the ousting of dictatorial rule that resulted from the intervention.⁸⁶⁷

Another example can be found from the Treaty of Guarantee of Cyprus (1960), an agreement between Cyprus, Greece, Turkey and the United Kingdom.⁸⁶⁸ The treaty was designed to ensure the status of Cyprus and was officially adopted on its independence from the United Kingdom. However, the treaty's provisions, including an Article that arguably allowed Greece, Turkey and the United Kingdom the right to intervene militarily in Cyprus to defend the purposes of the agreement,⁸⁶⁹ were negotiated before Cyprus had officially gained sovereignty.⁸⁷⁰ This fact was brought into question years later by the new government of Cyprus, which held that not only had the treaty been concluded well before the proper formation of political community in the country, but that it had also been signed by unelected representatives.⁸⁷¹ It was hence suggested that the treaty's provisions, especially the ones on the use of force on Cyprus' territory, could not immediately bind the State and should therefore be re-evaluated.⁸⁷² One can question if these ventures were seriously noted within the international community: when Turkey militarily intervened in Cyprus in 1974, partially in legal reference to the 1960 Treaty, its actions were met with little opposition from other States.⁸⁷³

For a current example of treaty-based issues, one can turn to the on-going military crisis in Ukraine. Although Russia has largely based its intervention in Eastern Ukraine upon the *ad hoc* consent given by the ousted President Yanukovich,⁸⁷⁴ a treaty allowing the former to deploy a certain number of troops on the latter's territory is in fact in effect between these two States.⁸⁷⁵ With Russia's increasing military presence and activities in

⁸⁶⁵ Record of the Security Council's 2902nd Meeting, pp. 18-20; Tanca, *Foreign Armed Intervention*, p. 184.

⁸⁶⁶ *Effects of the Military Intervention by the United States of America in Panama on the situation in Central America*, paras. 1-5.

⁸⁶⁷ Tanca, *Foreign Armed Intervention*, p. 184; Gray, *International Law and the Use of Force*, p. 92.

⁸⁶⁸ Marston (ed), 'United Kingdom Materials', p. 620.

⁸⁶⁹ *Ibid.*

⁸⁷⁰ Wippman, 'Treaty-Based Intervention', pp. 639-640.

⁸⁷¹ *Ibid.*, p. 640.

⁸⁷² *Ibid.*

⁸⁷³ Tanca, *Foreign Armed Intervention*, p. 165.

⁸⁷⁴ Record of the Security Council's 7125th Meeting, pp. 3-4.

⁸⁷⁵ *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, General Assembly Items 38 and 81, 9 June 1997, UN Doc. A/52/174, Annex I; Record of the Security Council's 7125th Meeting, pp. 3-4.

Ukraine and the annexation of Crimea, it has become clear that the scope of the consent provided in the treaty has been exceeded, which — according to the perimeter of the *Definition of Aggression* (1974) — may amount to aggression.⁸⁷⁶

In any event, the military activities raise the question of the status of the agreement. At this point, most of the international community seems to agree that Russia has violated the prohibition on use of force, the principle of non-intervention and territorial sovereignty of another State with its actions in Ukraine.⁸⁷⁷ It has annexed a region of Ukraine and according to many accounts, it offers direct military support to the separatists involved in the Ukrainian Civil War.⁸⁷⁸ The situation is grave and in many aspects unprecedented in current international relations: under these circumstances, could any treaty previously conducted between Ukraine and Russia, in particular one concerning the use of force, still be valid?

This question connects to the last issue concerning interventions based on treaties, the situations wherein the previously legitimate government is effectively overthrown in the host State. Under such circumstances, the host State is obviously in the midst of internal turmoil: however, could a third State still invoke the previously ratified treaty as a basis for an invited intervention in favour of the ousted government? By default, the answer is no. It has been submitted that in dubious cases, the current will of the host State should prevail over the previous one, even if the earlier consent had been issued in the form of a forward-looking treaty.⁸⁷⁹ To put it differently, even a properly conducted treaty should become nullified as soon as the territorial State so decides, for whatever reason.⁸⁸⁰ This is obviously an enormous shortcoming of treaty-based interventions, and showcases that such agreements have their limitations.

Of course, in some limited instances an ousted government has been allowed to invite foreign intervention to restore its position, even if an opposing faction has taken up the power.⁸⁸¹ The condition has been that the government's ousting is due to a third State militarily supporting the rivalling faction, thus making the faction's rise to power a result of a foreign armed intervention.⁸⁸² This scenario remains, at the very least, possible for

⁸⁷⁶ *Definition of Aggression*, Article 3(e).

⁸⁷⁷ *Territorial Integrity of Ukraine*, Preamble and paras. 1-2 and 5-6.

⁸⁷⁸ *Inter alia* Council Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 78, 17 March 2014, p. 16; Council Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ 229, 31 July 2014, p. 13.

⁸⁷⁹ Wippman, 'Treaty-Based Intervention', p. 631; Institut de Droit International, Sub-Group C Resolution (10 RES-C EN PLENIERE), Article 5.

⁸⁸⁰ Institut de Droit International, Sub-Group C Resolution (10 RES-C EN PLENIERE), Article 5.

⁸⁸¹ Brownlie, *International Law and the Use of Force*, p. 327.

⁸⁸² *Ibid.*

treaty-based interventions as well, and is no doubt a claim that many States would put forward in such situations. However, the inherent limitations of interventions based on treaties apply here as well, resulting in *ad hoc* consent being an indefinitely better option in most cases.

2.2.4. Final Remarks on Procedural Requirements

The procedure on issuing an invitation should have a clear goal: it ought to make sure that the consent for the use of force reflects the sovereign will of the host State. While this procedure does not include many definite requirements regarding the form of the invitation, certain realities must be addressed. These realities are predominantly found in truly treaty-based interventions which include no *ad hoc* consent at all. In such circumstances the intervenor must take particular care to conserve the genuine will of the host State, especially if the subsequent intervention is executed well after the treaty's conclusion. If this is not achieved, there may be a conflict between former host State consent and the current sovereign will. After all, governments are rotated continuously, which may create political dissonance over matters concerning the use of force. Such dissonance, or even a chance of it, will obviously complicate the possible armed intervention tremendously. In fact, it might be best to accompany an invited intervention with real-time consent, even if an effective treaty technically allows for it.

At a more general level, although few conditions concerning the formalities of the invitation exist, the matter is not completely free of issues. Most importantly, whether an invitation has been given genuinely and free of duress remains a persistent problem, regardless of the form of the consent. However, even if States developed sturdier requirements for the invitation to intervene, they would be unlikely to eradicate the problem. This is one of the issues which falls beyond the reach of international law, as its subjects tend to engage in conduct relating to coercion behind closed doors. In other words, one would find it practically impossible to impose a legal test which would faultlessly determine if the consent is given in accordance with the host State's actual intent. This finding brings us back to one of the core legal issues of contemporary intervention by invitation: even though it supposed to reflect the territorial State's will, it is actually often enforced to strengthen the sovereign interests of the intervenor.

Of course, the procedural conditions detailed here also mirror certain common values⁸⁸³ which intervention by invitation serves, albeit often implicitly. For instance, the preference for *ad hoc* interventions can be interpreted as acknowledging that intervention by invitation is not a planned feature of the Charter's framework. Rather, the concept is

⁸⁸³ A concept more thoroughly discussed in Chapter II, Section 2.2.2.

being put into practice to compensate for the incomplete implementation of collective security, making it a form of impromptu first-aid.

2.3. Withdrawing the Invitation: What Procedures Should Be Followed?

2.3.1. The General Consequences of Withdrawing an Invitation

Once the objectives of an armed intervention have been reached, the military activities by the intervenor should cease. However, this is easier said than done, as bringing the military action to an end is one of the most persistent problems of invited interventions. This seems counterintuitive, as from the legal perspective, ending an invited intervention should be simple enough. As soon as the host State's consent is extinguished, so should the armed intervention.⁸⁸⁴ This is due to the legal basis that the host State's consent validates the use of force by the intervening State: when the consent no longer exists, the use of force becomes unlawful as described in Article 2(4) of the Charter.⁸⁸⁵ The best way of ending the intervention is thus quite straight-forward: the inviting authority retracts the invitation, which is then followed by a timely and otherwise appropriate withdrawal of any foreign troops on the host State's territory.⁸⁸⁶ Failure to comply with this arrangement may result in aggression towards the territorial State.⁸⁸⁷

But as practice has shown, the matter is more complicated. There have been deep disagreements about the manner in which the host State should withdraw its invitation, creating an almost ironic juxtaposition with the legal and political leniency given towards issuing one.⁸⁸⁸ It has been argued that the consent may have to be retracted in a particular manner for it to be effective: this argument is most often invoked in treaty-based interventions. As a result, multiple invited interventions have been dragged out well past their initial deadlines, sometimes leading to a *de facto* occupation of the host State.⁸⁸⁹

The key case concerning this matter is *DRC v. Uganda*, which was adjudged by the ICJ in 2005. The case, which was a result of the difficult history of the Democratic Republic of the Congo, partially dealt with the issues over withdrawing the invitation to intervene. During the Congolese conflicts, many of its neighbouring States interfered militarily: Uganda was one of the States invited to intervene by the Congo, but the two States could not find consensus on how and when Uganda's intervention should have

⁸⁸⁴ Lieblich, 'Intervention and Consent', p. 364; Wippman, 'Military Intervention', p. 234.

⁸⁸⁵ UN Charter, Article 2(4); *Definition of Aggression*, Article 3(e); *Friendly Relations*, Principle I; *Rights and Duties*, Article 9.

⁸⁸⁶ Lieblich, 'Intervention and Consent', pp. 364-366.

⁸⁸⁷ *The Definition of Aggression*, Article 3(e).

⁸⁸⁸ *DRC v. Uganda*, paras. 49-51; Lieblich, 'Intervention and Consent', pp. 365-366.

⁸⁸⁹ *Territorial Integrity of Ukraine*, Preamble and paras. 1-2 and 5-6; Green, 'Editorial Comment', pp. 5-7.

ended.⁸⁹⁰ More specifically, there was a legal disagreement between the parties over the procedure of the invitation's withdrawal.

The Applicant held that although it had initially submitted an invitation for Uganda's intervention, this invitation had since been withdrawn, resulting in Uganda's forces failing to fall back in a timely manner.⁸⁹¹ Uganda refuted this argument by claiming that since the two States had regulated the invited intervention through a written agreement, revoking the Congo's consent should have been done in accordance with that treaty, and with a specific mention of Uganda's troops.⁸⁹² In other words, Uganda held that the withdrawal of the consent was subject to particular conditions unfollowed by the Congo, which resulted in the invitation still being valid.⁸⁹³

In the end, the Court held that in this particular case the withdrawal of consent was not subject to any specific conditions.⁸⁹⁴ It was adjudged that while the Congo and Uganda did in fact decide on the terms of the latter's military intervention in their Agreement, the proper invitation to intervene had actually been submitted earlier.⁸⁹⁵ As it turned out, the entire intervention was a result of multiple agreements, some of which were formal while others were not.⁸⁹⁶ As the Congo had given the consent to intervene informally, revoking it could not be subject to any conditions, either.⁸⁹⁷ In other words, the Agreement, although in other respects valid, could not attach any requirements to the invitation's retraction. As often happens, the ICJ's judgment did not take a definite, more general stance on the matter, meaning that it may be difficult to immediately apply the findings of the case in other situations. *Au contraire*, some interpretation is necessary.

One might approach the Court's judgment and its general impact on invited interventions in many ways. It could be argued that if an invitation to intervene is submitted in a particular manner, the withdrawal of the consent must be done similarly. This could assume that if the Agreement between the Congo and Uganda had entailed the initial invitation to intervene, the consent should have been withdrawn according to its conditions. After all, the Court did stress the fact that the invitation to intervene had been issued free of any form, and that thus other conditions had to follow suit.⁸⁹⁸ However, certain scholars have been unwilling to accept this conclusion, as *ad hoc* consent has been

⁸⁹⁰ *DRC v. Uganda*, paras. 49-50.

⁸⁹¹ *Ibid.*

⁸⁹² *Ibid.*, para. 50.

⁸⁹³ *Ibid.*

⁸⁹⁴ *Ibid.*, para. 51.

⁸⁹⁵ *Ibid.*, para. 47.

⁸⁹⁶ *Ibid.*

⁸⁹⁷ *Ibid.*, para. 51.

⁸⁹⁸ *Ibid.*

preferred as the primary base for an armed intervention.⁸⁹⁹ Otherwise the military action will become use of force against the host State, perhaps even aggression; consequently, the intervention will turn into a violation of both Article 2(4) of the Charter and a norm of *ius cogens*, while not forgetting the sovereignty of the host State.⁹⁰⁰ In such cases the invitation, regardless of its form, must yield to the Charter and peremptory norms, making the consent in question an inapplicable basis for an armed intervention.⁹⁰¹

Another point left ambiguous by the ICJ was the matter of open-ended invitations to intervene and how such invitations should be revoked. The Court did not take time to adjudge upon the lawfulness of such invitations because it was not pertinent to the case: the consent issued by the Congo was not meant to be infinite in nature, and thus legal evaluation on the matter was not necessary.⁹⁰² From the legal perspective, it is dubious if truly open-ended invitations can exist. The legality of any invited intervention depends on the sovereign will of the host State, and thus the span armed measures must follow that State's intentions.⁹⁰³ In other words, the possible scope of an invited intervention should always be inherently limited to the host State's wishes. As a result, certain commentators have submitted that real-time consent must trump ones issued previously, a stance which reflects the continued preference for *ad hoc* consent.⁹⁰⁴ Of course, this does not indicate that previously issued invitations must be discarded altogether, as situations can exist in which a State's later revocation of consent does not serve its true sovereign will.⁹⁰⁵ For instance, this can be the case when the host State is experiencing heavy political turbulence.⁹⁰⁶

2.3.2. Ending an Intervention Due to an Ousted Government

An invited intervention ideally ends as soon as the host State validly retracts its consent.⁹⁰⁷ However, sometimes an armed intervention must cease even when an invitation has not been withdrawn in such a way, for instance when the position of the

⁸⁹⁹ Liebllich, 'Intervention and Consent', pp. 364-366; Wippman, 'Treaty-Based Intervention', p. 612.

⁹⁰⁰ Liebllich, 'Intervention and Consent', pp. 365-366; *Definition of Aggression*, Article 3(e).

⁹⁰¹ UN Charter, Articles 2(4) and 103; *Fragmentation of International Law*, paras. 330 and 334; Vienna Convention on the Law of Treaties, Articles 53 and 64; Cassese, *International Law*, p. 371.

⁹⁰² *DRC v. Uganda*, para. 52.

⁹⁰³ Wippman, 'Military Intervention', p. 234; Byrne, 'Consent and the Use of Force', p. 104.

⁹⁰⁴ Liebllich, 'Intervention and Consent', p. 364; Wippman, 'Treaty-Based Intervention', p. 612 and 631.

⁹⁰⁵ Wippman, 'Treaty-based Intervention', pp. 650-651.

⁹⁰⁶ *Ibid.*

⁹⁰⁷ *DRC v. Uganda*, paras. 47 and 49-51; *Definition of Aggression*, Article 3(e); Wippman, 'Military Intervention', p. 234.

inviting authority changes. What should then happen if the legitimate representative is effectively overthrown or challenged by another factor during the intervention? May the intervenor still consider the invitation to be valid, since it was such at the beginning of the operation? Or should the intervention cease in conjunction with the inviting authority's status?

Most importantly, the legality of intervention by invitation rests upon the sovereign capacity of the host State, which should be maintained at the time of the military operation. By default, it must be held that if the formerly legitimate representative is no longer such, it should also lose its ability to invite a foreign intervention into the State.⁹⁰⁸ Consequently, any invitation previously issued by that actor should no longer legitimise foreign armed interventions, even those currently in progress, since the allocation of power within the territorial State has shifted.⁹⁰⁹ In fact, continuing an armed intervention to support the ousted government under such circumstances could possibly violate the duty of non-intervention, since any State should be allowed to carve its political path without interference from others.⁹¹⁰

Nonetheless, in past practice certain ousted governments have not immediately lost their right to consent to external force.⁹¹¹ In fact, some exiled leaders of internationally recognised governments have been allowed to invite foreign interventions quite a considerable time after their deposeal.⁹¹² This could mean that the government being ousted may not always result in the nullification of the invitation, at least if the government held effective control before.⁹¹³ Still, these interventions have tended to take place with international involvement, thus basing them on commonly agreed goals.⁹¹⁴ Moreover, practice on the matter is far from uniform. For instance, the former Ukrainian President Yanukovich was deemed to have lost his position immediately on fleeing his homeland in early 2014, which led to the international community condemning the

⁹⁰⁸ Brownlie, *International Law and the Use of Force*, p. 327.

⁹⁰⁹ *Ibid.*

⁹¹⁰ *Friendly Relations*, Principle III; *Inadmissibility of Intervention*, paras. 1-2 and 5; *Rights and Duties*, Articles 1 and 3-4.

⁹¹¹ de Wet, 'Modern Practice of Intervention by Invitation', p. 990.

⁹¹² Fox, 'Intervention by Invitation', pp. 385-386; Record of the Security Council's 3413rd Meeting, pp. 4-5, 8, 12-14 and 23; Statement by the President of the Security Council, 26 February 1998.

⁹¹³ de Wet, 'Modern Practice of Intervention by Invitation', p. 990.

⁹¹⁴ Fox, 'Intervention by Invitation', pp. 385-386; de Wet, 'Modern Practice of Intervention by Invitation', pp. 996-997; *Sierra Leone*, SC Res. 1132, paras. 1, 3 and 8; *UN Mission in Haiti*, SC Res. 940, para. 4.

Russian intervention based on his invitation.⁹¹⁵ Thus, the matter appears to require case-by-case evaluation, and careful consideration of the political agenda behind any given situation.⁹¹⁶

In addition, the main rule may harbour an additional exception that permits the intervention to continue even if the inviting authority has been factually deposed. If the former government has either been ousted or lost effective control due to a foreign armed intervention, its ability to consent to the use of force may have been retained, meaning that any current interventions may be allowed to proceed as well.⁹¹⁷ The possible application of this exception thus completely depends on the circumstances in which the government has had its position wavered, and whether it includes any foreign elements, in particular those relating to the use of force. Still, in today's global community — where the line between international correspondence and intervention has become fine— this concept may appear too vague.

Perhaps some support for this argument can be drawn from past remarks over the overthrown government's possibility to invite an armed intervention during a civil war. Under this formulation, an ousted government may still consent to a foreign intervention in certain situations: that is, when the rebelling forces responsible for the ousting have received military support from a third State in a manner that was crucial for its advancement.⁹¹⁸ In such situations the coup can be deemed a result of the use of force by another State, which naturally amounts to a violation of Article 2(4) of the Charter, as well as the duty of non-intervention.⁹¹⁹ As a consequence, it may be possible for a previously invited intervention to continue even in the face of ousting the government, if said ousting has happened due to foreign military support.

This line of argumentation received much support in the past and has also been brought up in discussions concerning contemporary invited interventions.⁹²⁰ However, the current position of these scenarios may be partially threatened by the trends concerning invited interventions. For instance, the rising application of the democratic legitimacy requirement may offer complications, as it questions the manner in which the inviting

⁹¹⁵ Record of the Security Council's 7125th Meeting, pp. 5, 7, 14 and 18; *Territorial Integrity of Ukraine*, paras. 1-6; de Wet, 'Modern Practice of Intervention by Invitation', pp. 989-990 and 992.

⁹¹⁶ de Wet, 'Modern Practice of Intervention by Invitation', p. 992.

⁹¹⁷ Brownlie, *International Law and the Use of Force*, p. 327.

⁹¹⁸ *Ibid.*

⁹¹⁹ *Ibid.*; UN Charter, Article 2(4); *Friendly Relations*, Principles I and III; *Rights and Duties*, Articles 4 and 9; *Inadmissibility of Intervention*, paras. 1-2 and 5.

⁹²⁰ Laura Visser, 'Russia's Intervention in Syria', EJIL: *Talk!*, 25 November 2015, <www.ejiltalk.org/russias-intervention-in-syria>.

authority should be identified in the first place.⁹²¹ This has led certain States to recognising opposition forces as the legitimate representative of the host State, denoting that they have been willing to deploy force against the traditional government of another country.⁹²² The fact that such activity now takes place in the public eye suggests that some are willing to bend the definitions on the legitimate representative of the host State: if the whole definition is questioned, how could an effectively ousted government continue to hold on to its power to invite a foreign intervention? This dilemma may mean that the sturdier divisions between governments and oppositions could be in the past, which consequently makes the notion of upholding an ousted government's ability to invite an intervention more dubious.

All in all, the propositions aimed at preserving an ousted government's position have already had their fair share of difficulties before and may face even more in the future. When it comes down to it, the current developments may indicate that the application of this proposition may be nearly impossible, at least under certain circumstances. This mirrors the general development of intervention by invitation. Even though the doctrine had its issues during the Cold War, it was still continuously used in fairly predictable settings. Conversely, modern invited interventions have not only been applied under varying circumstances, but they have also gained many new shades. This has turned the doctrine from a steady work horse of Cold War politics into a wild card, which may discard the previous confinements instilled upon it by its former owners and find success in completely different situations.

⁹²¹ de Wet, 'Modern Practice of Intervention by Invitation', pp. 984-985; Wippman, 'Military Intervention', p. 218-219.

⁹²² Fox, 'Intervention by Invitation', pp. 837-839.

3. Intervention by Invitation in Different Contexts: Discerning the Interests and Goals

The apparently simple intervention by invitation comes with myriad issues, many of which relate to the agenda behind it. Accordingly, the doctrine's practice has been laced with varyingly camouflaged individual intents, from which it has been difficult to deduct common values. Nonetheless, as discussed earlier, at least the Cold War incarnation of intervention by invitation carried a community-serving purpose, albeit not as a starring role. Moreover, this tentative connection between apparent unilateralism and *de facto* collectivity in invited interventions does go back several centuries, as evidenced by the doctrine's entwinement with collective security.⁹²³

Thus, intervention by invitation has managed a two-fold part. While the forefront of it has touted sovereign interests, the subtext has championed ultimately common goals. In other words, the concept simultaneously exhibits internal and international elements, which have begun to merge since the conclusion of the Cold War. To examine further the interplay between these two sides, we ought to study the concept and its development under a range of circumstances. For this purpose, this section will map the practice of intervention by invitation in internal unrest, non-international armed conflicts and international contexts.

3.1. The Seemingly Unilateral Beginnings: Invited Interventions and Internal Unrest

3.1.1. Internal Unrest as the Premise of Intervention by Invitation Throughout History

If the frequent and confusing State practice on intervention by invitation has proved anything, it is that the concept is most likely applied during internal unrest. After all, the host State's invitation to intervene is only applicable on its own territory: it naturally cannot validate armed activities in third States. Moreover, intervention by invitation, at least during the loaded atmosphere of the Cold War, has offered the governments of various States a powerful and thus lucrative tool in maintaining their political position.⁹²⁴ This has resulted in the doctrine being applied to help a struggling government to hold on to a regime threatened by internal unrest and even attempted coups.

Historically, the threat of internal unrest has been linked with the very conception of intervention by invitation. In traditional international law, this appeared in the efforts that occurred in the aftermath of the French Revolution (1789-1799), when many European

⁹²³ See Chapter III, Section 3.2.

⁹²⁴ Hargrove, 'Intervention by Invitation', pp. 115-116 and 119; Wedgwood, 'Commentary on Intervention by Invitation', p. 137.

States began to fear the chance of such uprisings in their own societies.⁹²⁵ The Holy Alliance (1815) is regularly cited as perhaps the first attempt to divert such outcomes.⁹²⁶ The treaty, which was signed by Austria, Prussia and Russia, allowed the contracting States the right to intervene to restore order in the face of such adversities.⁹²⁷ The Quadruple Alliance, which included these three States in addition to Great Britain, was also established during the same year.⁹²⁸ The Quadruple Alliance was later expanded to the Quintuple Alliance, when France was allowed to join the fold in 1818.⁹²⁹

These alliances found certain success in practice, for instance in 1821 when Austrian troops intervened in Naples and Turin, and again in 1823 when France put out an attempt at independence in Spain.⁹³⁰ Nevertheless, the ultimate success of these alliances was hampered by the conflicting views on intervention among the States.⁹³¹ This was in particular manifested in the views of Great Britain, which had officially disassociated itself from interventionist alliances by 1823.⁹³² Following this trend, the dissolution of the interventionist system began soon after.⁹³³ Eventually, only the Triple Alliance comprising Austria, Prussia and Russia, — the founding trio of such interventionist treaties — persisted for decades, before ceasing to exist in 1848.⁹³⁴

When observing these historical developments, one can discern that the treaties did not result in long-lasting alliances which would have yielded numerous interventions to observe in retrospect. Of course, these collective treaties are not the only examples of intervention based on invitation at the time: for instance, the French occupation of Syria in 1860-1861 is partially attributed to the consent issued by the territorial State following the massacre of thousands of Maronite Christians.⁹³⁵ Nonetheless, the concept of intervention in another State's affairs was still fairly new at the time. Consequently, the interventions of this era can be interpreted as having had ambiguous legacies that do not solely affect intervention by invitation: they can also be counted as attempts at collective

⁹²⁵ Cassese, *International Law*, pp. 28-29.

⁹²⁶ Jarna Petman, *Human Rights and Violence: the Hope and the Fear of the Liberal World* (Helsinki, Hakapaino Oy, 2012), p. 239.

⁹²⁷ *Ibid.*; Cassese, *International Law*, p. 29.

⁹²⁸ Chesterman, *Just War or Just Peace*, p. 22; Treaty of Alliance and Friendship, Great Britain - Austria, Article 3.

⁹²⁹ Chesterman, *Just War or Just Peace*, p. 23.

⁹³⁰ Cassese, *International Law*, p. 29.

⁹³¹ Chesterman, *Just War or Just Peace*, p. 23; Petman, *Human Rights and Violence*, p. 239.

⁹³² Chesterman, *Just War or Just Peace*, p. 23; Petman, *Human Rights and Violence*, pp. 239-240.

⁹³³ Petman, *Human Rights and Violence*, p. 239.

⁹³⁴ Chesterman, *Just War or Just Peace*, p. 23.

⁹³⁵ *Ibid.*, p. 32.

security and humanitarian intervention, depending on one's perspective on the matter.⁹³⁶ Nonetheless, it ought to also be observed that intervention by invitation, while superficially invoked to attend to internal matters, already bore a collective element. In fact, the alliances discussed above had been born out of the desire to avoid a repeat of Napoleon's wars.⁹³⁷ To this end, they sought to promote regional peace through maintaining internal stability of respective States.

Following this examination of the 1800s, it is pertinent to skip over to the UN era. After all, the most notable invited interventions of the early 1900s took place in the contexts of non-international armed conflicts, which will be discussed later in this chapter.⁹³⁸ The Cold War, however, was filled with examples of invited interventions during internal unrests, which tended to take place in geopolitically strategic States. The interventions were often staged in the opposing 'Blocs' by the time's superpowers, the United States and the Soviet Union, in an attempt to maintain their status in their mutual power struggle.⁹³⁹ As the two States avoided direct conflict with each other, holding as many allied governments as possible proved vital for both: they were thus willing to intervene militarily if an ally was facing internal difficulties.⁹⁴⁰ This led to certain troubling restorations of governments in distress, where the continuing legitimacy of the inviting authority was questioned. Moreover, at times, third States intervened in order to quell uprisings: these rebellions appeared to threaten the political influence of the intervening State, making the interventions dubious from the perspective of the right to self-determination.⁹⁴¹

A prominent illustration is the Soviet-led intervention in Czechoslovakia in 1968. During the Cold War, Czechoslovakia was one of the well-acknowledged satellite States under the influence of the Soviet Union, also known as the Soviet Bloc.⁹⁴² This situation did not sit wholly well within Czechoslovakia, and hence in the late 1960s, certain movements tried to unleash the country from such foreign influence. These movements culminated in the Prague Spring of 1968, which aimed at the liberalisation of the

⁹³⁶ Ibid., p. 33; Cassese, *International Law*, p. 29; Brownlie, *International Law and the Use of Force*, p. 19.

⁹³⁷ Glennon, *Limits of War*, p. 13.

⁹³⁸ See Section 3.2. of this chapter.

⁹³⁹ Gray, *International Law and the Use of Force*, p. 84; Mullerson, 'Intervention by Invitation', pp. 127-130; Hsiung, *Anarchy and Order*, p. 22; Nolte, 'Intervention by Invitation', *The Max Planck Encyclopedia*, January 2010, para. 4.

⁹⁴⁰ Mullerson, 'Intervention by Invitation', pp. 127-130.

⁹⁴¹ Tanca, *Foreign Armed Intervention*, pp. 34 and 48-49.

⁹⁴² Bert V. A. Röling, 'The Concept of Security and the Function of National Armed Power' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Dordrecht, Martinus Nijhoff Publishers, 1986), p. 302.

country's internal and external politics.⁹⁴³ The Soviet Union did not respond to these developments kindly: throughout 1968 its troops more or less questionably remained in Czechoslovakia, while the Soviet leaders expressed concern for the country's situation.⁹⁴⁴ The Soviet troops did eventually leave Czechoslovakia's territory in early August 1968, only to return a couple of weeks later with other Warsaw Pact forces in order to execute what turned out to be a wide-scale occupation of the State.⁹⁴⁵ The intervention was partially attributed to a purported consent of the Czechoslovak Communist Party, even though various commentators expressed confusion and doubts over who exactly invited the intervention.⁹⁴⁶ The Czechoslovakian government of the time stated that no invitation had been supplied, as it instead maintained that the military presence on its territory was illegal.⁹⁴⁷ Hence, it appears that the supposed invitation was fabricated, making the use of force against international law.⁹⁴⁸

Another textbook example is the US-led military intervention in Grenada in 1983.⁹⁴⁹ Formerly a British colony, Grenada attained Statehood in 1974.⁹⁵⁰ However, due to the country's position as a Commonwealth State, the position of the official — albeit ceremonial — Head of State continued to be held by Queen Elizabeth II, who was represented in Grenada by a Governor General.⁹⁵¹ The State naturally had its own government, which was initially headed by Sir Eric Gairy, considered by some sources to be corrupt.⁹⁵² In March 1979 a left-wing coup was staged in the country, resulting in Gairy's ousting and the establishment of a revolutionary council headed by Maurice Bishop.⁹⁵³ The coup stirred internal unrest in the then-new-born country, which struggled to find a way between attempts at building democracy and a more radical regime.⁹⁵⁴ During this time Sir Paul Scoon, the Governor General of the time, managed to maintain

⁹⁴³ Gray, *International Law and the Use of Force*, p. 93.

⁹⁴⁴ Tanca, *Foreign Armed Intervention*, pp. 160-161.

⁹⁴⁵ Gray, *International Law and the Use of Force*, p. 93.

⁹⁴⁶ Record of the Security Council's 1443rd Meeting, paras. 9-12; Tanca, *Foreign Armed Intervention*, p. 161; Rosalyn Higgins, 'The Attitude of Western States Towards Legal Aspects of the Use of Force' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Dordrecht, Martinus Nijhoff Publishers, 1986), p. 446.

⁹⁴⁷ Record of the Security Council's 1443rd Meeting, paras. 9-12.

⁹⁴⁸ Gray, *International Law and the Use of Force*, p. 93.

⁹⁴⁹ Tanca, *Foreign Armed Intervention*, pp. 39-40; Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation', p. 234.

⁹⁵⁰ Tanca, *Foreign Armed Intervention*, p. 179; Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation', p. 234.

⁹⁵¹ Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation', p. 234.

⁹⁵² *Ibid.*

⁹⁵³ Record of the Security Council's 2491st Meeting, para. 20; Tanca, *Foreign Armed Intervention*, p. 39.

⁹⁵⁴ Tanca, *Foreign Armed Intervention*, pp. 39 and 179.

his formal status, but this position was largely considered just as ceremonial as the aforementioned Head of State it represented.⁹⁵⁵ Bishop was later ousted and executed in October 1983, and a new revolutionary council led by General Austin took over the State.⁹⁵⁶

These controversial developments did not sit well with the United States, amongst other States in the region. A few days after Bishop's demise, armed forces consisting of both US troops and those of the Organisation of East Caribbean States intervened in Grenada.⁹⁵⁷ The armed forces managed to take control of the island and end the unrest by the end of October, with the US military maintaining their presence in Grenada until December 1983.⁹⁵⁸ Akin to many Cold War military interventions, legally the armed activities were based on multiple justifications.⁹⁵⁹ One of them was the purported invitation from the Governor General Scoon, whose position within Grenada was doubtful at best.⁹⁶⁰ Overall, the international reaction to the intervention was predominantly negative.⁹⁶¹ When it comes to intervention by invitation in particular, only a handful of States bothered to take a direct stance on the matter; however, these responses were not in favour of the intervention.⁹⁶² France — a notable intervener upon request itself — stated that the concept was not applicable in this particular case, as no consent from the legitimate representative of Grenada had been retrieved.⁹⁶³

The Cold War bore many similarly questionable invited interventions into cases of internal unrest;⁹⁶⁴ however, for fear of turning this dissertation into a pure case montage, it is not advisable to go through all of them. Instead, attention should be turned to the position of intervention since the end of this political crisis. Intervention by invitation as a concept encountered a change after the Cold War, which can be seen as having reflected

⁹⁵⁵ Ibid., p. 40.

⁹⁵⁶ Record of the Security Council's 2491st Meeting, para. 21; Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation', p. 235; Tanca, *Foreign Armed Intervention*, p. 179.

⁹⁵⁷ Record of the Security Council's 2491st Meeting, paras. 23, 28 and 65; Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation', p. 235.

⁹⁵⁸ Tanca, *Foreign Armed Intervention*, p. 179.

⁹⁵⁹ Record of the Security Council's 2491st Meeting, paras. 65-77; Tanca, *Foreign Armed Intervention*, p. 179.

⁹⁶⁰ Record of the Security Council's 2491st Meeting, paras. 24 and 74; Tanca, *Foreign Armed Intervention*, pp. 40 and 179.

⁹⁶¹ *The Situation in Grenada*, paras. 1-6.

⁹⁶² Record of the Security Council's 2489th Meeting, paras. 80-81 and 146; Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation', p. 238; Tanca, *Foreign Armed Intervention*, p. 40.

⁹⁶³ Record of the Security Council's 2489th Meeting, para. 146; Tanca, *Foreign Armed Intervention*, p. 40.

⁹⁶⁴ Tanca, *Foreign Armed Intervention*, p. 24.

its application during internal unrests as well. Since the early 1990s, much of the doctrine's focus has been dedicated to Africa, where consent has been invoked as a legal basis for interventions between regional States.⁹⁶⁵ However, these interventions have contained issues which have ranged from the validity of the invitation to the context of a civil war.⁹⁶⁶ In any event, this points towards a trend of having more political balance between the intervenor and the host State. Nevertheless, many problems persist in this setting, and they will be discussed in the next subsection.

3.1.2. Issues Concerning Intervention by Invitation and Internal Unrest

Applying intervention by invitation in cases of internal unrest has been natural in both the past and present, but this practice does not come without inherent legal issues. Perhaps the biggest of these complications is identifying when the unrest escalates into a full-scale conflict. This is of particular importance, for intervening by invitation in civil wars has been considered unlawful in the past.⁹⁶⁷ However, even internal unrest short of an armed conflict is not completely free of such doubt. The entire legality of intervention by invitation rests on the assumption that it occurs at the behest of sovereign consent, which has been properly issued by a legitimate authority. However, the mere need to invite foreign military intervention may signal that the internal unrest has escalated to a point at which the existence of such authority can be questioned.⁹⁶⁸ In other words, the fact that armed intervention is necessary to enforce the political apparatus within the host State may already signify the loss of the government's mandate from the people, perhaps even the presence of a civil war.⁹⁶⁹

This issue relates to the concept of sovereignty and the government as the embodiment of the State's will. Solving the problem can result in different outcomes, depending on one's perspective. If one were to follow the idea of sovereignty endorsed by Thomas Hobbes, this matter would not be a big problem: since its power is almost unlimited, a State is

⁹⁶⁵ Record of the Security Council's 3987th Meeting, p. 10; Ahmed Ali M. Khayre, 'Self-Defence, Intervention by Invitation, or Proxy War? The Legality of the 2006 Ethiopian Invasion of Somalia' (2014) 22 *African Journal of International and Comparative Law* 208, pp.222-223; de Wet, 'Modern Practice of Intervention by Invitation', pp. 981 and 998; Erika de Wet, 'Reinterpreting Exceptions to the Use of Force in the Interest of Security: Forcible Intervention by Invitation and the Demise of the Negative Equality Principle' (2017) 111 *American Journal of International Law Unbound* 307, p. 308.

⁹⁶⁶ *Democratic Republic of Congo*, SC Res. 1234, Preamble and paras. 1-2; Khayre, 'Self-Defence, Intervention by Invitation, or Proxy War?', p. 227; de Wet, 'Modern Practice of Intervention by Invitation', pp. 981, 996 and 998.

⁹⁶⁷ *Rights and Duties of States*, Article 4; *Inadmissibility of Intervention*, para. 2; *Friendly Relations*, Principle III.

⁹⁶⁸ Wippman, 'Treaty-Based Intervention', pp. 626-627.

⁹⁶⁹ *Ibid.*

accountable to no one, including its own people.⁹⁷⁰ It is therefore entitled to use measures, even the most extreme ones, against them.⁹⁷¹ However, more modern ideas have emphasised the validity of the government being based upon the will of its people, in one way or another.⁹⁷² This makes the use of force against the people of the State problematic, and eliminating internal unrest with an invited intervention may very well contravene it.

These concerns have been at least partially addressed by the rise of the right to self-determination, according to which the people of any given State must be free to decide *inter alia* on their political, cultural and economic matters.⁹⁷³ Since the end of the Cold War, it has become increasingly accepted that a State may not validly invite foreign intervention with the purpose of containing thoroughly internal insurgencies of the population.⁹⁷⁴ How invited interventions actually pan out is another matter. Still, there has been development which affords more power to the people, which makes the political prospect of using invited interventions against them less alluring.

Despite these issues, internal unrest still poses the least problems for intervention by invitation. As will be argued later, incidents and conflicts with international elements bring forward many issues, as do full-scale internal armed conflicts. It could even be said that cases of internal unrest provide the most natural scenario for invited interventions, albeit with certain limitations and complications. However, it may currently be difficult to draw the line between internal unrest and non-international armed conflict, particularly given the transitions the latter has gone through since the Cold War. Examining non-international conflicts and invited interventions in a separate section is therefore pertinent, and this task will be undertaken next.

3.2. Injecting Invited Interventions into Non-International Armed Conflicts

3.2.1. The Threshold of Non-International Conflict and Invited Interventions

If putting invited interventions into practice in the context of internal unrest has been difficult enough, so have been its appearances in other circumstances. In fact, one of the biggest debates over invited interventions has concerned its relationship with non-international armed conflicts, sometimes also referred to as civil wars.⁹⁷⁵ While this topic is heavily featured in contemporary discussions, its roots date back centuries.⁹⁷⁶

⁹⁷⁰ Hobbes, *Leviathan*, pp. 120-121; Hobbes, *Man and Citizen*, pp. 258-259; Pettman, *Human Rights and Violence*, p. 245.

⁹⁷¹ Hobbes, *Leviathan*, pp. 120-121.

⁹⁷² Wippman, 'Pro-democratic Intervention by Invitation', pp. 293-295 and 299-300.

⁹⁷³ Tanca, *Foreign Armed Intervention*, pp. 48-49.

⁹⁷⁴ *Ibid.*; Bannellier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 864.

⁹⁷⁵ Marston (ed), 'United Kingdom Materials', p. 616.

⁹⁷⁶ Fox, 'Intervention by Invitation', pp. 821-823.

Consequently, the issue has also received wide-spread attention since the conception of the United Nations and its scheme for the use of force.⁹⁷⁷

During the first few decades of the UN era, it was held that once the threshold of a non-international conflict was crossed, intervention by invitation became inapplicable.⁹⁷⁸ It was argued that foreign military intervention in any civil war could result in a violation of the principle of non-intervention, as armed activities of other States could affect the outcome of the strife.⁹⁷⁹ The earlier, cynical position was thus that all States should have the opportunity to settle their own internal differences, even through the means of war.⁹⁸⁰ The participants of the international community, including the United Nations, were expected to stay neutral, since the matter concerned a single State's domestic order rather than commonly upheld values.⁹⁸¹

In addition to this general observation, a particular problem persists. Once a situation escalates into an internal armed conflict, the host State may no longer have an effective government that could legitimately issue a plea for foreign intervention.⁹⁸² This approach goes hand in hand with the effective control argument: once the warring factions in the State have gained enough leverage for the situation to be regarded as a civil war, the government's effective control over the territory and population must be deemed to have been lost.⁹⁸³

However, this premise has been challenged by States and scholars alike. Even during the Cold War, when such practice was widely considered unlawful, select States would regularly intervene in internal conflicts, most often to support the government against rebel forces.⁹⁸⁴ The responses to such actions ranged from mixed to negative, which often led to States either denying their involvement or arguing the absence of an internal armed conflict, suggesting that the inadmissibility of foreign intervention in civil wars itself was not questioned.⁹⁸⁵ More recently, there has been a change towards a more lenient approach. Especially during the new millennium, States have expressed their acceptance of certain interventions into civil wars, a stance that has also been echoed by some

⁹⁷⁷ *Friendly Relations*, Principle III; *Inadmissibility of Intervention*, para. 2; *Rights and Duties*, Article 4.

⁹⁷⁸ Gray, *International Law and the Use of Force*, pp. 81 and 86-87.

⁹⁷⁹ *Rights and Duties*, Article 4; *Friendly Relations*, Principle III; *Inadmissibility of Intervention*, para. 2.

⁹⁸⁰ *Inadmissibility of Intervention*, paras. 1-2.

⁹⁸¹ *Friendly Relations*, Principle III; *Inadmissibility of Intervention*, para. 2; *Rights and Duties*, Article 4; Franck, *Recourse to Force*, pp. 40-41.

⁹⁸² Wippman, 'Treaty-Based Intervention', p. 627.

⁹⁸³ *Ibid.*, pp. 627-628.

⁹⁸⁴ *Ibid.*, p. 627; le Mon, 'Unilateral Intervention by Invitation', pp. 754-755.

⁹⁸⁵ Gray, *International Law and the Use of Force*, pp. 81 and 86-87.

scholars.⁹⁸⁶ Consequently, it has been held that the increasing State practice may point to a change in the principle of non-intervention towards non-international armed conflicts.⁹⁸⁷

Still, one should not rush to conclusions. As mentioned earlier in this dissertation, the principle of non-intervention — and consequently the application of invited interventions — may not be modified so easily.⁹⁸⁸ Thorough research on the evolution of internal conflicts and unilateral interventions is therefore necessary before making any grander statements. Moreover, before moving on to the application of invited interventions in non-international armed conflicts, we should first define exactly what denotes such a conflict. As noted previously, the line between a mere internal unrest and conflict can be thin and subject to various interpretations. In its simplest definition, a civil war denotes an armed conflict that takes place within a single State,⁹⁸⁹ where all of the factions engaged in the fighting are domestic in nature.⁹⁹⁰ While this definition is broad, sporadic and isolated instances of internal disturbance and tension have been left outside its scope: this means that acts such as riots and disorganised violence do not yet denote the presence of a civil war.⁹⁹¹

But how does one tell if violence against the State's government has become organised enough to mark the beginning of civil strife? Traditional law on the matter tended to concentrate on the status of belligerency: once the government of the State was met with an opponent worthy of being labelled as a belligerent, the matter could be called a civil war wherein the opposing factions were on an equal footing.⁹⁹² However, if the opposing forces were merely identified as rebels or insurgents, the case was considered to be a situation that the government of the State had the agency to handle effectively, meaning that no clear internal strife had yet commenced.⁹⁹³ Although this status of belligerency may not have the same immediate importance as before, it can be used to determine when

⁹⁸⁶ de Wet, 'Reinterpreting Exceptions to the Use of Force', pp. 309-310.

⁹⁸⁷ Akande and Vermeer, 'The Airstrikes against Islamic State in Iraq', EJIL: *Talk!*, 2 February 2015.

⁹⁸⁸ *Nicaragua*, paras. 206-207.

⁹⁸⁹ Liebllich, 'Intervention and Consent', p. 344.

⁹⁹⁰ Geneva Convention Relative to the Protection Civilian Persons in Time of War of 12 August 1949 (12 August 1949, in force 21 October 1950), 75 UNTS 287, Article 3.

⁹⁹¹ The Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977), 1125 UNTS 609, Article 1(2).

⁹⁹² Cathryn Boals, 'The Internal War in Yemen' in Richard Falk (ed), *The International Law of Civil War* (The Johns Hopkins Press Ltd., London, 1971), p. 313.

⁹⁹³ *Ibid.*

an internal disturbance changes from sporadic to organised: if a formidable military faction has emerged, it may signify a possible non-international armed conflict.⁹⁹⁴

Politically speaking, drawing the line between internal unrest and civil war has been difficult for many States. This may not only be due to the two concepts appearing to be interchangeable. Rather, it may be the outcome of the general principle of neutrality that States have agreed to follow when another country is dealing with civil strife. Furthermore, traditionally a civil war has marked the loss of governmental control in the host State, which inevitably causes some disruption in international relations between countries.⁹⁹⁵ The conduct of third States in the face of such conflicts has hence been rather erratic, from traditional law to modern times.

3.2.2. The Principle of Non-Intervention, Civil Wars and Intervention by Invitation: from the Traditional Approach to the First Decades of the UN Era

The basis of the UN era's initial position on interventions in civil wars can be traced back to traditional law, which felt conflicted over the issue. This was not due to a lack of practice: foreign interventions in civil wars were not uncommon in the pre-Charter era. However, it does not follow that their legality was free of doubt. Ever since the first emergence of current-style interventions during the 1800s, the concept has faced contrasting opinions and much criticism, especially when the use of force has been put into the mix.⁹⁹⁶

It should thus come as no surprise that despite the persistent practice, military intervention on invitation in civil wars was considered ultimately undesirable from the legal point of view.⁹⁹⁷ This was partially due to the legal assumptions held at the time. It was argued that once a country had been plunged into a civil war, the status and territorial control of the government had been challenged by its opponents in the conflict, making them belligerents.⁹⁹⁸ As a result, outside interference, both military and non-military, was not encouraged: under certain circumstances such assistance was evidently considered to be prohibited.⁹⁹⁹ However, it was also claimed that once the opposition had gained the status of belligerency, both parties to the civil war could be regarded as holding the title

⁹⁹⁴ Brownlie, *International Law and the Use of Force*, pp. 324-325.

⁹⁹⁵ Wippman, 'Treaty-Based Intervention', p. 626.

⁹⁹⁶ Petman, *Human Rights and Violence*, p. 239.

⁹⁹⁷ Marston (ed), 'United Kingdom Materials', p. 616.

⁹⁹⁸ Wippman, 'Treaty-Based Intervention', pp. 627-628; Fox, 'Intervention by Invitation', p. 822.

⁹⁹⁹ Fox, 'Intervention by Invitation', pp. 822-823.

of sovereign.¹⁰⁰⁰ Consequently, it was argued, albeit not universally, that such a situation could have enabled foreign military assistance upon the invitation of either party.¹⁰⁰¹

Practice followed this muddled legal position with matching incoherence: some of this dissonance may be attributed the fine line between internal unrest and armed conflict, as well as the oft-disputed definitions of belligerency. While many States were reluctant to take part in conflicts of other countries, some would occasionally pitch their support for both governments and oppositions engaged in armed activities. Such was the case when the United Kingdom sent military aid to Portugal in 1826 in order to prevent a budding rebellion.¹⁰⁰² The Brits would then intervene again, this time with France and Russia, in favour of Greek insurgents during their struggle against the Turkish empire in 1827.¹⁰⁰³ In addition, the American Civil War (1861-1865) saw many European States debating their possible position in the conflict, but in the end most Western nations decided to stay uninvolved on the matter, deeming it an internal affair of the United States.¹⁰⁰⁴ This stance was echoed by the United States itself.¹⁰⁰⁵

The American Civil has been seen as a starting point for conduct that expected States to refrain from military interference,¹⁰⁰⁶ and by the Spanish Civil War (1936-1939) States had reached a tentative agreement over a principle of neutrality during civil wars in other countries.¹⁰⁰⁷ Many European States even concluded the Non-Intervention Agreement of August 1936, declaring that they would not intervene in the then on-going civil war in Spain.¹⁰⁰⁸ While this should have resulted in no armed support being given to any of the belligerents of the Spanish Civil War, many States — including Italy, Germany and an array of other countries — decided to provide such assistance.¹⁰⁰⁹ This situation goes on to show that States were not fully ready to relinquish the opportunity of intervening in non-international armed conflicts, even if a tentative legal framework on the matter had been agreed upon.

Still, the conclusion of the Second World War marked a new beginning for international relations, which leads us to civil wars in the UN era. With the adoption of the Charter it became evident that States were not only stressing the need for the non-use

¹⁰⁰⁰ Ibid., p. 822.

¹⁰⁰¹ Ibid., pp. 822-823.

¹⁰⁰² Brownlie, *International Law and the Use of Force*, p. 322.

¹⁰⁰³ Chesterman, *Just War or Just Peace*, pp. 28-29.

¹⁰⁰⁴ Quincy Wright, 'The American Civil War, 1861-65' in Richard Falk (ed), *The International Law and Civil War* (The Johns Hopkins Press Ltd., London, 1971), p. 31.

¹⁰⁰⁵ Ibid., p. 104.

¹⁰⁰⁶ Cassese, *International Law*, p. 402.

¹⁰⁰⁷ Van Wynen Thomas and Thomas Jr., 'International Legal Aspects of the Civil War in Spain, 1936-39', p. 141.

¹⁰⁰⁸ Jennings and Watts, *Oppenheim*, p. 437.

¹⁰⁰⁹ Van Wynen Thomas and Thomas, 'International Legal Aspects', pp. 164-165.

of force, but also for non-intervention.¹⁰¹⁰ Although the norm is absent from the Charter, the principle of non-intervention is mirrored in Article 2(7), which prohibits the UN from interfering in the affairs of its member States.¹⁰¹¹ The Article has been interpreted as having initially extended to the matter of non-international armed conflicts.¹⁰¹² This shows the will of States to retain a significant amount of control over their own matters despite their membership in the organisation. The principle of non-intervention, amongst many other factors, was seen to have covered the matter of civil wars as well: it was largely held that each State could decide on its own internal order even through an internal armed conflict.¹⁰¹³ Other States were expected to stay almost completely uninvolved on such issues, leaving little to no room for armed measures of any kind.¹⁰¹⁴

As it turned out, internal conflicts soon dethroned international ones as the biggest issue concerning the use of armed force, bringing civil wars to the forefront of the international community.¹⁰¹⁵ However, the legal stance that other States should stay out of the civil wars of other States remained mostly intact. The General Assembly touched upon the matter several times and always maintained that foreign intervention in a civil war is against international law.¹⁰¹⁶ This did not stop select States from intervening in such conflicts, however.¹⁰¹⁷ It should come as no surprise that the most powerful States in the world were the most willing to task themselves with intervening in civil wars of others.¹⁰¹⁸ As these non-international conflicts often held geopolitical interest, the superpowers saw them as opportunities — or even unavoidable necessities — in their power struggle. Hence, the United States, the Soviet Union, France and the United Kingdom, eighty percent of the permanent Security Council members, all played a major role in various civil wars.¹⁰¹⁹ This yet again reflects the intertwined position of intervention by invitation and the short-comings of United Nations' collective security: with the Security Council paralysed due to continuous impasses between its permanent members, those same States took to using unilateral armed measures as a *de facto* replacement.¹⁰²⁰

¹⁰¹⁰ Cassese, *International Law*, p. 54; Jennings and Watts, *Oppenheim*, p. 430.

¹⁰¹¹ UN Charter, Article 2(7).

¹⁰¹² Franck, *Recourse to Force*, pp. 40-41.

¹⁰¹³ *Rights and Duties*, Article 4; *Friendly Relations*, Principle III.

¹⁰¹⁴ Tanca, *Foreign Armed Intervention*, p. 50.

¹⁰¹⁵ Gray, *International Law and the Use of Force*, p. 67.

¹⁰¹⁶ *Rights and Duties*, Article 4; *Friendly Relations*, Principle III; *Inadmissibility of Intervention*, para. 2.

¹⁰¹⁷ Wippman, 'Military Intervention', pp. 212-213.

¹⁰¹⁸ Gray, *International Law and the Use of Force*, p. 84.

¹⁰¹⁹ *Ibid.*, pp. 84-86, and 92-93.

¹⁰²⁰ le Mon, 'Unilateral Intervention by Invitation', p. 792.

Still, the unilateral practices of the permanent members were not completely alike. Of these four States, the United Kingdom and France focused on intervening in civil wars that took place in their former colonies.¹⁰²¹ The position of France particularly became prominent, as it not only intervened in various countries, predominantly in Africa, but also multiple times.¹⁰²² In comparison to this, the activities of the United Kingdom were less notable.¹⁰²³ The United States and the Soviet Union were concentrating on ensuring their political affluence in the host States, and thus supported governments or factions that strengthened this agenda.¹⁰²⁴ The two rivalling States took much care to avoid immediate conflict with each other, but they would often seize the opportunity to intervene in other conflicts taking place elsewhere in the world.¹⁰²⁵ Such activity spared the superpowers from direct confrontation, which many feared would have had disastrous consequences. Many of these armed measures took place in the form of proxy wars,¹⁰²⁶ but direct measures were by no means unheard of either.

Still, it ought to be noted that Cold War military interventions in civil wars, either directly or via proxy, were often problematic. A famous example is the Soviet armed intervention in Afghanistan in late 1979, when the latter had been overcome with internal turmoil and continuous coups.¹⁰²⁷ The armed intervention, which was partially based upon the purported sovereign consent and a pre-existing treaty, resulted in the establishment of a new Afghan government, which unsurprisingly was one with a pro-Soviet stance.¹⁰²⁸ The matter of who the Soviets originally claimed to have invited their military intervention remained a baffling mystery.¹⁰²⁹ The mere existence of such authority is highly unlikely as even if one of the factions in Afghanistan invited the Soviet intervention, it was effectively and promptly ousted by the same State that it had asked for help.¹⁰³⁰ Hence, the international response to the incident largely dismissed the possibility of the intervention by invitation argument, instead stressing that the Soviet

¹⁰²¹ Dominique Moïsi, 'Intervention in French Foreign Policy' in Hedley Bull (ed), *Intervention in World Politics* (New York, Oxford University Press, 1984), p. 67; Marston (ed), 'United Kingdom Materials', p. 616.

¹⁰²² Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', pp. 863-864; Tanca, *Foreign Armed Intervention*, pp. 157, 162, 169-172, 180.

¹⁰²³ Tanca, *Foreign Armed Intervention*, pp. 150-152.

¹⁰²⁴ Mullerson, 'Intervention by Invitation', pp. 128-129; Nolte, 'Intervention by Invitation', *The Max Planck Encyclopedia*, January 2010, para. 4.

¹⁰²⁵ Gray, *International Law and the Use of Force*, p. 84.

¹⁰²⁶ Bertil Dunér, *Military Intervention in Civil Wars: the 1970s* (Aldershot, Gower Publishing, 1985), pp. 99 and 101-103.

¹⁰²⁷ Tanca, *Foreign Armed Intervention*, pp. 176-177.

¹⁰²⁸ Gray, *International Law and the Use of Force*, pp. 92-94.

¹⁰²⁹ *Ibid.*

¹⁰³⁰ *Ibid.*; Record of the Security Council's 2190th Meeting, paras. 12-13 and 39.

military activity violated various norms of international law, including the ban on use of force, the duty of non-intervention and the self-determination of peoples.¹⁰³¹ For these reasons, the Security Council attempted to condemn the Soviet intervention in one of its Resolutions, which was blocked by the veto of the Soviet Union itself.¹⁰³²

The Soviet arch nemesis of the time, the United States, responded to and fuelled the frequent Soviet interventions in civil wars with similar conduct. Many of its interventions were deemed to have spited the on-going civil wars in the target States. For instance, during the Nicaraguan internal conflict it offered direct support to the contras, resulting in the violations of non-use of force and the principle of non-intervention.¹⁰³³ Moreover, the United States delivered covert support for the Afghan insurgents after the aforementioned Soviet measures developed into the Afghanistan War, a move which brought the two rivals within the sphere of the same armed conflict.¹⁰³⁴ However, since the US involvement took place via proxy, the superpowers managed to avoid direct confrontation with one another, further proving the raw sensibility that purported intervention by invitation provided at the time.¹⁰³⁵

As noted above, the Cold War was also characterised by the military interventions of powerful States in the civil wars of their former colonies. France is a famous example, and its frequent activity eventually resulted in open mockery of its foreign policy.¹⁰³⁶ For instance, the State's frequent military interventions in Chad raised some eyebrows between 1966 and 1989, as the view of many was that the country had fallen into a long-lasting civil war.¹⁰³⁷ Throughout the Cold War, France's position on the conflict was not straight-forward. It either denied any military involvement, or defended its right to intervene upon the valid request of Chad's authorities, whichever they were at the

¹⁰³¹ Record of the Security Council's 2190th Meeting, paras. 12-13, 21, 29, 39, 44-46, 64, 77, 106-107, 127, 129, 140 and 152.

¹⁰³² Ibid., para. 140; Tanca, *Foreign Armed Intervention*, p. 177.

¹⁰³³ *Nicaragua*, paras. 238 and 242.

¹⁰³⁴ Hargrove, 'Intervention by Invitation', p. 123; Burley, 'Commentary on Intervention', pp. 177-78.

¹⁰³⁵ It is, of course, debatable whether the US support for insurgents can be classified as intervention by invitation. However, one should note that during this time the United States was already championing the idea of supporting democratic movements, an argument which found its way to certain blatant invited interventions as well. See W. Michael Reisman, 'Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions and Prospects' in Lori Fisler Damrosch and David J. Scheffer (eds), *Law and Force in the New International Order* (Boulder, Westview Press, 1991), p. 34, and Record of the Security Council's 2902nd Meeting, pp. 7-8.

¹⁰³⁶ Moïsi, 'Intervention in French Foreign Policy', p. 67.

¹⁰³⁷ Tanca, *Foreign Armed Intervention*, pp. 162, 172 and 180-181; le Mon, 'Unilateral Intervention by Invitation', p. 768.

time.¹⁰³⁸ Moreover, the State sporadically invoked the claims of collective self-defence, as during this time, Chad was also engaging in a conflict with Libyan troops who supported a faction of the civil war.¹⁰³⁹ France's actions were not condemned, which would seem to suggest that other States approved of them,¹⁰⁴⁰ however, this could be due to Libya's involvement in the conflicts, which legally made the matter a question of collective self-defence rather than pure intervention by invitation.

Still, this practice does not necessarily mean that States sought to disband the duty of non-intervention in civil wars. Rather, the intervening States would attempt to deny the existence of a conflict of such magnitude instead of challenging the legal premise.¹⁰⁴¹ They sometimes even refuted intervening in a civil war altogether, in particular when support was given to rebelling factions, which further seems to stress the legal assumption that such actions were unlawful at the time, even in the mind of the frequent intervenors.¹⁰⁴² Moreover, the international response to such interventions was often predominantly negative, and not least due to the duty of non-intervention.¹⁰⁴³ This seems to suggest that the Cold War's invited interventions in civil wars were a result of pure political necessity rather than a focused attempt to modify existing legal rules on the matter. Such a statement would conform to the opinion of the ICJ in *Nicaragua* at least, as in its judgment the Court found that the principle of non-intervention appeared to be misused rather than developed by certain activities of select States.¹⁰⁴⁴

Still, as noted in the thesis, there was a legal proposition according to which foreign armed support to the government even in civil wars was plausible if the rebels had been receiving external support as well.¹⁰⁴⁵ In such situations, the government's position was interpreted to have been destabilised due to foreign use of force. Within the limits of this argument, the host State's government was allowed to invite foreign interventions even if it had lost effective control over the country — the condition was that this complete loss of control had happened due to the opposition receiving military help from another State.¹⁰⁴⁶ However, the position of this proposition was already vague back then, and thus its lasting legacies to foreign interventions in civil wars are unclear.

¹⁰³⁸ le Mon, 'Unilateral Intervention by Invitation', pp. 770 and 774.

¹⁰³⁹ Ibid., p. 777; Tanca, *Foreign Armed Intervention*, p. 181.

¹⁰⁴⁰ le Mon, 'Unilateral Intervention by Invitation', p. 777.

¹⁰⁴¹ Gray, *International Law and the Use of Force*, pp. 86-88.

¹⁰⁴² Burley, 'Commentary on Intervention', pp. 177-78.

¹⁰⁴³ See *inter alia* the Record of the Security Council's 2190th Meeting, paras. 12-13, 21, 29, 39, 44-46, 64, 77, 106-107, 127, 129, 140 and 152, where the Soviet involvement in the civil war in Afghanistan was widely condemned. See also Tanca, *Foreign Armed Intervention*, p. 177.

¹⁰⁴⁴ *Nicaragua*, paras. 206-207.

¹⁰⁴⁵ Brownlie, *International Law and the Use of Force*, p. 327.

¹⁰⁴⁶ Ibid.

3.2.3. The Modern Developments: Extracting Common Interests from Non-International Armed Conflicts

The status of civil wars as internal matters of each individual State took a dramatic turn at the dawn of the 1990s. With the Security Council revitalised, it took to exercising collective use of force much more regularly than previously.¹⁰⁴⁷ Perhaps surprisingly, the Council's focus was firmly set on internal conflicts, even those that had passed the threshold of a civil war.¹⁰⁴⁸ Although collective use of force was designed to be applied in inter-State conflicts, this new setting became the norm for Security Council action as it decided to authorise military action in various civil wars.¹⁰⁴⁹ This means that periods of internal unrest and non-international armed conflicts may threaten or breach international peace and security as detailed in Chapter VII, and ultimately even warrant collective military measures.¹⁰⁵⁰ This extension of collective security has been accepted with the international community, and few arguments have been over any purported violations of the principle of non-intervention.¹⁰⁵¹

Accepting that the Security Council may authorise collective measures in response to civil wars indeed affected the relation between such conflicts and the principle of non-intervention. In other words, civil wars can no longer be seen as purely internal affairs, leading to a partial modification of the principle of non-intervention. Hence, determining that non-international armed conflicts can infringe international peace and security has more far-reaching consequences than immediately imagined. Still, the current practice of collective security should not be interpreted as having completely erased the internal nature of civil wars. Rather, it means that the term 'non-international armed conflict' is no longer such a shield of invincibility that it renders all outside interference inexhaustible.

But how has this modification affected intervention by invitation? Very much, some may suggest. The past few decades have been filled with military interventions in civil wars, and the international community's responses have been more accepting than during the Cold War.¹⁰⁵² It would therefore seem that the extended scope of collective security has been extended to unilateral armed interventions at least somewhat, which naturally includes invited interventions as well. A current example of this is the US-led armed

¹⁰⁴⁷ Gray, *International Law and the Use of Force*, p. 264.

¹⁰⁴⁸ Gazzini, *Changing Rules*, pp. 31-32.

¹⁰⁴⁹ *Ibid.*, pp. 31-32; Franck, *Recourse to Force*, pp. 40-41.

¹⁰⁵⁰ *Somalia*, SC Res. 794, 3 December 1992, UN Doc. S/RES/794, para. 10; *UN Mission in Haiti*, SC Res. 940, Preamble and para. 4; *Sierra Leone*, SC Res. 1132, Preamble and para. 8; *Libya*, SC Res. 1973, Preamble and para. 4; Chesterman, *Just War or Just Peace*, p. 129.

¹⁰⁵¹ Franck, *Recourse to Force*, pp. 40-42; Jamnejad and Wood, 'Principle of Non-intervention', pp. 377-378.

¹⁰⁵² de Wet, 'Modern Practice of Intervention by Invitation', pp. 992-994.

intervention in Iraq, which started in 2014 after the Iraqi government asked for a military assistance in order to combat ISIS.¹⁰⁵³ As keen observers would know, Iraq has faced much instability, generated by both internal and foreign influences. At the beginning of 2003, the country was invaded by the United States during the 'War on Terror', as the latter deemed the former to be a threat to both national and international security.¹⁰⁵⁴ Although the US intervention was widely deemed to have no basis in international law,¹⁰⁵⁵ their forces remained in Iraq until 2011: this military presence was partially based upon an agreement between the two countries.¹⁰⁵⁶

After the United States had left Iraq, the country faced fragmentation and the looming threat of extremism, which was soon realised in the form of the terrorist group ISIS.¹⁰⁵⁷ Iraq was then plunged into what would traditionally be described as a civil war, through which ISIS managed to make notable headway by seizing large portions of Iraq's territory.¹⁰⁵⁸ In the summer of 2014, Iraq's incumbent government issued a direct plea for a foreign intervention, which was soon responded to by the United States and a collection of other countries.¹⁰⁵⁹ A coalition of States was formed to take active military measures against ISIS, which have occurred both in and out of Iraq.¹⁰⁶⁰ The conflict in Iraq could be seen as a purely internal one: however, due to ISIS's status as a terrorist organisation and its attempts to build a completely new State, the matter is also international in nature. Hence, the US-led intervention in Iraq has not met too much opposition, despite the elements of a non-international armed conflict and the arguable loss of effective control by the Iraqi government.¹⁰⁶¹

It would seem that making a distinction between an internal and international armed conflict is getting more difficult by the minute, especially when international terrorist

¹⁰⁵³ Henderson, 'Editorial Comment', pp. 209-212.

¹⁰⁵⁴ Record of the Security Council's 4701st Meeting, 5 February 2003, UN Doc. S/PV.4701, p. 17; Gray, *International Law and the Use of Force*, p. 218.

¹⁰⁵⁵ Record of the Security Council's 4726th Meeting, 26 March 2003, UN Doc. S/PV.4726, pp. 8, 12-13, 16, 19-21, 28, 30-33, 35 and 37-38.

¹⁰⁵⁶ Agreement on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, Articles 1 and 24; Liebflich, 'Intervention and Consent', pp. 340-341.

¹⁰⁵⁷ Henderson, 'Editorial Comment', pp. 209-210; Seumas Milne, 'Now the Truth Emerges: How the US fuelled the rise of ISIS in Syria and Iraq', *The Guardian*, 3 June 2015, <www.theguardian.com/commentisfree/2015/jun/03/us-isis-syria-iraq>.

¹⁰⁵⁸ Henderson, 'Editorial Comment', p. 210.

¹⁰⁵⁹ Ibid.; Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, 25 June 2014, UN Doc. S/2014/440, Annex.

¹⁰⁶⁰ Guardian staff and agencies, 'US-led Coalition Conducts 13 Air Strikes Against Isis in Iraq and Syria in 24 Hours', *The Guardian*, 8 March 2015, <www.theguardian.com/world/2015/mar/08/coalition-forces-air-strikes-isis-iraq-syria>.

¹⁰⁶¹ Henderson, 'Editorial Comment', pp. 209-210.

organisations are concerned. This, too, has had an effect on foreign interventions in civil wars, as nowadays such actions are often justified with self-defence alongside host State consent.¹⁰⁶² One may therefore determine that the definite, all-encompassing ban on foreign intervention in civil wars has been lifted; however, this does not mean that third States can freely intervene in such conflicts. The duty of non-intervention has not ceased to exist but rather has evolved to allow flexibility over foreign involvement in internal conflicts. This means that any unilateral intervention directly aimed at matters that solely belong to the host State is still not allowable.¹⁰⁶³ Instead, foreign armed intervention in a civil war may only be permissible when pursuant of global interests, such as matters concerning collective security or international terrorism.¹⁰⁶⁴

This statement sounds difficult to put into practice. However, certain distinguishable lines must be drawn, as unwarranted unilateral interventions in civil wars simply cannot be a viable option. If individual States are allowed to freely support any faction of any internal conflict, it could simultaneously annihilate the principle of non-intervention and deeply infringe on the notion of sovereignty.¹⁰⁶⁵ This option had already been examined by the ICJ in *Nicaragua*, and with a negative conclusion at that.¹⁰⁶⁶ The Court famously held that the principle of non-intervention would practically cease to exist if a foreign armed intervention could be invited by any establishment other than the properly distinguished government.¹⁰⁶⁷ Therefore, utterly unilateral interventions by invitation at the behest of mere rebels in a civil war must remain inapplicable, at least as long they are executed free of commonly accepted goals.¹⁰⁶⁸

In addition, the finding made by the ICJ leads us to an additional and equally important issue that still needs to be resolved: the effective control test, which still stands as the primary means to assess the legitimate representative.¹⁰⁶⁹ Hence, even if we are to accept that a unilateral foreign armed intervention is allowable in a civil war, the inviting authority must still hold an acceptable amount of control over the host State.¹⁰⁷⁰ If the situation has escalated into a fully-fledged armed conflict, the mere existence of such an

¹⁰⁶² Akande and Vermeer, 'The Airstrikes against Islamic State in Iraq', *EJIL: Talk!*, 2 February 2015.

¹⁰⁶³ Bannelier-Christakis, 'Military Interventions against ISIL', p. 747.

¹⁰⁶⁴ *Ibid.* Such was the case in Mali in 2013, see *Mali*, SC Res. 2100, Preamble, and also Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 864.

¹⁰⁶⁵ de Wet, 'Modern Practice of Intervention by Invitation', p. 983.

¹⁰⁶⁶ *Nicaragua*, para. 246.

¹⁰⁶⁷ *Ibid.*

¹⁰⁶⁸ However, it should be noted that some hold invited interventions — at the behest of the government — to be applicable in non-international armed conflicts by default, given the constant State practice on the matter, see de Wet, 'Reinterpreting Exceptions to the Use of Force', p. 310.

¹⁰⁶⁹ de Wet, 'Modern Practice of Intervention by Invitation', pp. 983 and 996-997.

¹⁰⁷⁰ Jennings and Watts, *Oppenheim*, pp. 437-438.

authority might be impossible.¹⁰⁷¹ This dilemma is referred to as the negative equality principle, according to which outsiders to the conflict are in no position to make such deliberations, leaving non-involvement the best option.¹⁰⁷² However, the negative equality principle is regarded as quite a flimsy one, as certain States tend to discard it in their activities.¹⁰⁷³ Still, it might seem pertinent to state that intervention by invitation in civil wars is most clearly permissible when the inviting body has been able to maintain or claim necessary effective control over the territory of the host State, or it has been recognised as legitimate by the international community at large.¹⁰⁷⁴

However, losing such control does not necessarily denote the inability to invite a foreign intervention, at least not immediately.¹⁰⁷⁵ As noted earlier in this thesis, the effective control test does allow some flexibility over the loss of control.¹⁰⁷⁶ Even long-lasting civil wars do not always strip a legitimate representative of its authority, a scenario realised in the on-going Malian conflict, as well as the military intervention in Yemen.¹⁰⁷⁷ It would thus not seem too far-fetched to imagine that if a faction manages to claim effective control over the host State, it too could invite a foreign military intervention. However, sometimes the emergence of such an amount of control is not plausible. In any event, the means exhausted to gain such a position during an armed conflict are bound to be questionable and a far cry from the international principles ideally attributed to the legitimate representative of any State. Of course, in its purest form the effective control argument does not care about such nuances: however, the limitations imposed by the self-determination of the peoples, for instance, might beg to differ.¹⁰⁷⁸

With this in mind, we should once again discuss the Syrian Civil War, which began in 2011 and has seen the recent emergence of ISIS as one of the war's factions.¹⁰⁷⁹ All in all, the situation is complicated: various factions exist, all of them holding a significant amount of Syrian territory under their control. As a result, if the effective control test is exhausted, the outcome is that of an impasse. Despite this premise, certain States have pledged their support to one of the parties of the conflict. Russia has supported the Syrian government's regime throughout the civil war, whereas the United States has — albeit

¹⁰⁷¹ Wippman, 'Treaty-Based Intervention', p. 627.

¹⁰⁷² Fox, 'Intervention by Invitation', pp. 827 and 839-840.

¹⁰⁷³ de Wet, 'Reinterpreting Exceptions to the Use of Force', p. 310.

¹⁰⁷⁴ Fox, 'Intervention by Invitation', pp. 837-838 and 840.

¹⁰⁷⁵ de Wet, 'Modern Practice of Intervention by Invitation', pp. 990 and 996-997.

¹⁰⁷⁶ Ibid., p. 990.

¹⁰⁷⁷ Ibid., p. 996-997; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', pp. 865-866; Vermeer, 'The Jus Ad Bellum and the Airstrikes in Yemen', *EJIL: Talk!*, 30 April 2015.

¹⁰⁷⁸ Bannelier-Christakis, 'Military Interventions against ISIL', pp. 746-747.

¹⁰⁷⁹ Henderson, 'Editorial Comment', p. 209.

first very carefully — backed a faction of the rebels.¹⁰⁸⁰ For the longest time, it was indicated that both States had submitted military support in the conflict; in 2014 the United States took a step further when its coalition decided to launch military strikes against ISIS in the Syrian territory.¹⁰⁸¹ In what can only be described as irony, the Syrian government seemed to welcome these strikes despite the United States not consulting them on the matter.¹⁰⁸²

The situation has now been further complicated by Russia staging a direct military intervention at the invitation of al-Assad and with the goal of combatting ISIS.¹⁰⁸³ This means that the former arch enemies of the Cold War are each supporting what they purport to be the legitimate representative of Syria. In addition, both States seem to be basing their argumentation on values such as democratic legitimacy, which does not yet stand as the sole way to identify the representative of the host State.¹⁰⁸⁴

It is possible to argue that the effective control test has been fused with the need to validate the certain democratic legitimacy of the inviting authority. However, even if this qualification is used in the case of Syria, the stalemate is still unavoidable: given the situation, it is impossible to detect the democratic will of the Syrian people. Hundreds of thousands of people have lost their lives and millions have fled the country to seek asylum. In other words, defining the democratic will of the State is a near-impossible task, and something that individual States cannot solve by themselves.¹⁰⁸⁵

Legally speaking, situations such as the Syrian Civil War remind us of the reason intervention by invitation still exists. It is a practice that should not be needed anymore but it continues to be deployed due to the continued failures to centralise the use of force.¹⁰⁸⁶ Hence, intervention by invitation is a controversial backup plan to collective use of force. In the legal sense, however, it is much more limited than collective security, which has been warranted with practically unlimited boundaries by the Charter.¹⁰⁸⁷ By all legal and political measures, the Syrian Civil War is a matter that should belong to the

¹⁰⁸⁰ Associated Press in Istanbul, 'Turkey and US Agree to Train and Arm Syrian Rebels in Fight Against Isis', *The Guardian*, 19 February 2015, <www.theguardian.com/world/2015/feb/19/turkey-us-train-syrian-rebels-fight-isis>.

¹⁰⁸¹ Jim Sciutto, Mariano Castillo and Holly Yan, 'US Airstrikes Hit ISIS Inside Syria for First Time', *CNN News*, 23 September 2014, <edition.cnn.com/2014/09/22/world/meast/u-s-airstrikes-isis-syria>.

¹⁰⁸² Mullen, 'US Airstrikes on ISIS in Syria: What You Need to Know', *CNN News*, 24 September 2014.

¹⁰⁸³ Lister, 'Russia's Syria Expedition: Why Now and What's Next?', *CNN News*, 1 October 2015.

¹⁰⁸⁴ Fox, 'Intervention by Invitation', p. 838; Visser, 'Russia's Intervention', *EJIL: Talk!*, 25 November 2015.

¹⁰⁸⁵ Fox, 'Intervention by Invitation', pp. 838-840.

¹⁰⁸⁶ de Wet, 'The Modern Intervention by Invitation', p. 998.

¹⁰⁸⁷ UN Charter, Articles 24, 39 and 41-42.

Security Council, but it has been unable to bring the conflict towards a resolution.¹⁰⁸⁸ Intervention by invitation has been brought up as an alternative, but it is simply unable to deal with the matter efficiently, at least in the long term. If anything, the various foreign interventions by different States with conflicting goals have made the situation even more chaotic and dangerous, as evidenced by the Russian military jet downed by Turkey in 2015.¹⁰⁸⁹ The military interventions may thus have prolonged the conflict at hand.

However, the political adaptability of intervention by invitation has made its appearance in the Syrian conflict predictable. Although it lacks the practically unlimited legal discretion allowed to collective security, its approach complements the political interests of individual States. The major powers have been unwilling to find consensus on the Syrian Civil War, and intervention by invitation allows them to seek their own resolutions. Of course, the developments following the Paris attacks in November 2015 may have given hope on a more uniform response to the matter. The Security Council has already called for the UN member States to take action to combat ISIS, but it has stopped short of authorising military action in Syria or elsewhere.¹⁰⁹⁰

It is still much too early to assess the full effect of these developments. As evidenced by the 9/11 attacks and their aftermath, the immediate global sympathy that stems from terrorist attacks can easily subside if the victim State resorts to its own idea of justice, one which discards the properly established legal norms.¹⁰⁹¹ In addition, much of the on-going argumentation for the necessity of deploying armed force in the Syrian territory does not seem to contribute towards new legal criteria on the matter. While necessity is the mother of invention, morphing such inventions into new law may not be so simple, as noted by the ICJ on multiple occasions.¹⁰⁹² It thus remains to be seen if the development will be confined to our time, or if it will contribute towards the formation of new international law.

¹⁰⁸⁸ Dag Hammarskjöld Library, 'Security Council — Veto List (in reverse chronological order)', <research.un.org/en/docs/sc/quick/>.

¹⁰⁸⁹ Luke Harding, 'Shooting Down of Russian Jet - How the Day Unfolded', *The Guardian*, 24 November 2015, <www.theguardian.com/world/2015/nov/24/shooting-down-of-russian-jet-how-the-day-unfolded>.

¹⁰⁹⁰ *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 2249, 20 November 2015, UN Doc. S/RES/2249, para. 5.

¹⁰⁹¹ Gazzini, *Changing Rules*, pp. 76-81.

¹⁰⁹² *Nicaragua*, paras. 206-207.

3.3. Common Values and Sovereign Interests Entwined: Invited Interventions under Internationalised Circumstances

3.3.1. The Shift Toward More Explicitly Internationalised Invited Interventions

As noted, intervention by invitation has tended to carry along certain themes throughout its existence. While most immediately invoked to serve individual interests, the doctrine's practice has been laced with collective elements too, such as its beginnings being connected to the conception of collective security.¹⁰⁹³ Nonetheless, these two ingredients have tended to play clearly defined, separate parts, up until the conclusion of the Cold War at least. However, this separation may have been surprisingly superficial, for intervention by invitation during the UN era has always carried a subtext of maintaining a sustainable global balance despite its outward appearance. Of late, this subtext may be evolving into an actual context. In fact, consensual use of force has recently found itself more immediately bound with external elements and common interests, which has challenged its infamous image.

This change is manifested in the circumstances the concept has been applied in, as these contexts have increasingly included elements of explicitly international nature. For instance, the French intervention in Mali in 2013 was not only pursued following a decision to deploy collective security by the Security Council,¹⁰⁹⁴ the intervention was also executed due to the presence of a terrorist organisation in the Malian conflict.¹⁰⁹⁵ Thus, while the French intervention could be regarded as a throwback to the State's Cold War interventionist policy, it came with new globalised flavours.¹⁰⁹⁶

Of course, a scenario such as the French intervention in Mali has always been allowable within the conceptual sphere of intervention by invitation. Although the more traditional landscape for the concept is the internal matters of the host State, it may also be exhausted in international situations, perhaps even in certain circumstances involving immediate inter-State force. Still, it is subject to many limitations that may make its use impractical. The biggest hurdle of using invited interventions in an international conflict comes with its core premise: the invitation of the host State may validly legitimise the use of force on its own territory only.¹⁰⁹⁷

This makes the use of invited interventions as a response to external threats a less alluring option, as it cannot act as a justification for military activities that take place

¹⁰⁹³ See Chapter II, Section 3.2.

¹⁰⁹⁴ *Mali*, SC Res. 2085, Preamble and para. 9.

¹⁰⁹⁵ *Ibid.*, Preamble; *Mali*, SC Res. 2100, Preamble; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 864.

¹⁰⁹⁶ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', pp. 863-864.

¹⁰⁹⁷ Brownlie, *International Law and the Use of Force*, p. 327; *International Law Commission's Draft Articles on State Responsibility*, Article 20.

beyond the host State's borders.¹⁰⁹⁸ Unilateral use of force on such a spectrum is limited to the right of self-defence following an armed attack.¹⁰⁹⁹ Still, despite this limitation, in some situations intervention by invitation could be useful in combatting the external use of force short of an armed attack, especially since the option of self-defence, at least according to the wording of Article 51 of the Charter, should be unavailable during such circumstances.¹¹⁰⁰ After all, the use of force comes in many shades,¹¹⁰¹ against which intervention by invitation may offer valuable countermeasures.

In addition to external threats short of armed attacks, the issue of applying intervention by invitation in globalised circumstances has become progressively more important due to the muddled definitions between internal and international conflicts. Ever since the Security Council created the precedent that non-international armed conflicts may threaten or violate international peace and security, such strife has often seen international military involvement by individual States.¹¹⁰² Whether this unilateral activity is legally allowable is certainly questionable.¹¹⁰³ However, this uncertainty has not stopped persistent State practice on the matter, which seems to confirm that non-international armed conflicts may hold global interests as well, in particular those related to maintaining international peace and security.¹¹⁰⁴ Even further, this practice has suggested that intervention by invitation may have a role to play in such globalised civil wars, either in conjunction with or in the absence of collective security.¹¹⁰⁵

Therefore, examining intervention by invitation in situations which include international elements is of utmost importance. For this reason, this remainder of this section has been categorised into two parts in accordance with the global issues at hand. The first portion deals with the uses of force by States that are short of the threshold of an armed attack, to see how intervention by invitation may be applicable in such circumstances. The second part examines intervention by invitation as a response to breaches or threats of international peace and security and studies the completely or partially simultaneous application of invited interventions and collective security.

Scenarios in which the territorial State has undeniably suffered an armed attack and chooses to invite foreign military assistance as a response are not discussed here. This is

¹⁰⁹⁸ Brownlie, *International Law and the Use of Force*, p. 327.

¹⁰⁹⁹ UN Charter, Article 51.

¹¹⁰⁰ *Ibid.*

¹¹⁰¹ *Nicaragua*, para. 195; *Friendly Relations*, Principle I.

¹¹⁰² Akande and Vermeer, 'The Airstrikes against Islamic State in Iraq', *EJIL: Talk!*, 2 February 2015; Henderson, 'Editorial Comment', pp. 210-211.

¹¹⁰³ See Section 3.2. of this chapter.

¹¹⁰⁴ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 864.

¹¹⁰⁵ *Ibid.*; Henderson, 'Editorial Comment', pp. 210-212; de Wet, 'Modern Practice of Intervention by Invitation', p. 983.

a deliberate decision based upon the earlier findings of the thesis. In such situations, the concept of intervention by invitation would be absorbed by the right to self-defence, resulting in collective self-defence rather than consensual use of force.¹¹⁰⁶

3.3.2. Invited Intervention as a Response to Use of Force Short of an Armed Attack

Armed force may be applied against a sovereign State in several ways. The use of force currently prohibited under international law covers a large scope, from fairly small activities to a fully-fledged military intervention.¹¹⁰⁷ Not all of these forms amount to armed attacks: they do remain violations of the prohibition on the use of force, but they still do not activate the victim State's inherent right to self-defence.¹¹⁰⁸ Armed force short of armed attack is versatile, from delivering support to the victim State's military opposition groups to situating troops on that State's territory. Although they may not constitute an armed attack,¹¹⁰⁹ such activities inevitably infringe the victim State's sovereignty: if self-defence is out of the question, could an invited intervention be an option?

After all, while the injured State may be deprived of the right of self-defence, it does retain its sovereignty, which includes the capacity to invite a foreign armed intervention. An example is the on-going Ukrainian civil war. It has been well-established that Russia intervened in Ukraine in a manner that violated the prohibition on the use of force.¹¹¹⁰ However, it is debatable if the military activities fulfil the strict definition of an armed attack. While Russia has *inter alia* deployed its own military troops on Ukrainian soil in 2014 at the heights of the Crimean crisis, the actions of these troops arguably did not amount to use of force comparable to the concept of an armed attack.¹¹¹¹ The closest call has been Russia exceeding the limits of the Black Sea Fleet Partition Treaty, which by the virtue of having overstepped an invitation to intervene, may be considered to be aggression.¹¹¹² Furthermore, even though Russia has been widely accused of being involved in the civil war, most evidence supports the view that its participation has been limited to supporting the separatists in Eastern Ukraine, without directly taking part.¹¹¹³

¹¹⁰⁶ See Chapter III, Section 3.3.

¹¹⁰⁷ *Nicaragua*, para. 195; *Friendly Relations*, Principle I; Gray, *International Law and the Use of Force*, p. 30.

¹¹⁰⁸ *Nicaragua*, para. 195.

¹¹⁰⁹ *Ibid.*, paras. 195 and 210-211.

¹¹¹⁰ *Inter alia* the Record of the Security Council's 7125th Meeting, pp. 4-8 and 10-13; *Territorial Integrity of Ukraine*, Preamble.

¹¹¹¹ Some argumentation about the Russian actions not even being use of force at all does exist, but it has not been widely recognised, see Green, 'Editorial Comment', p. 5.

¹¹¹² *Definition of Aggression*, Article 3(e).

¹¹¹³ Tom Ruys and Nele Verlinden, 'Digest of State Practice 1 July — 31 December 2014' (2015) 2 *Journal on the Use of Force and International Law* 120, pp. 120-126.

Establishing that the Russian use of force does not amount to an armed attack may appear counterproductive from the perspective of international spectators. It was through these methods that Russia managed to annex a portion of Ukraine into itself, resulting in a deep violation of the latter's sovereignty and territorial integrity.¹¹¹⁴ However, the range of activities which signify an armed attack is slim, and the Russian uses of force do not unquestionably fall within that spectrum. In any event, this finding diminishes Ukraine's chances to engage in self-defence to repel the Russian military presence on its territory, leaving the latter with limited measures at its disposal.

This scenario appears to create a legal vacuum. How can a State which has lost a part of its territory due to unlawful use of force just sit by idly, without taking any countermeasures? However, while self-defence may remain unavailable to Ukraine in its current situation, other forms of armed intervention may still be legally available. Intervention by invitation, if it was to be confined within the borders of Ukraine, could be amongst these measures. In fact, consensual use of force might be the most plausible option in this case, as collective measures are impossible for political reasons.¹¹¹⁵

To a certain extent, States have discussed this option in reference to the Ukrainian crisis as well. As it has turned out, there has been debate about delivering weapons, training and other means of armed support to the Ukrainian government, most notably in the United States.¹¹¹⁶ Some say this type of support is already being delivered: however, a more flagrant intervention has not presented itself.¹¹¹⁷ Hypothetically speaking, if such an intervention was to take place, it would *de facto* be a response to foreign use of force, all the while being a part of an internal conflict. This further exemplifies the entwinement of internal and international conflicts, which may open new opportunities for the use of armed measures.

Of course, the not-so-steady continuance of these aspirations may result in them not having a long-lasting effect on the development of international law. For instance, just the example of the United States possibly supplying direct armed support to Ukraine may

¹¹¹⁴ *Territorial Integrity of Ukraine*, Preamble.

¹¹¹⁵ Given that as a permanent member Russia holds the power of veto in the Council, the organ is unlikely to take any measures in regard to Ukraine, especially military ones.

¹¹¹⁶ Shaun Walker, Alec Luhn and Spencer Ackerman, 'Ukraine: US Considers Military Help for Kiev as Separatists Plan to Mobilise Army', *The Guardian*, 2 February 2015, <www.theguardian.com/world/2015/feb/02/ukraine-us-considers-military-help-kiev-separatists-plan-mobilise-army>.

¹¹¹⁷ *Ibid.*

face resistance due to the on-going Trump presidency.¹¹¹⁸ Given this inescapable premise, immediately converting State practice into evidence for new law is short-sighted.

3.3.3. Maintaining International Peace and Security through Intervention by Invitation

As was noted earlier, the concepts of intervention by invitation and collective security can be traced back to the same source, the birth process of intervention itself in international relations.¹¹¹⁹ Although it may not appear so at first sight, the practices have thus been clearly connected for centuries, and they have been influencing and developing one another throughout their existence. And indeed, the superficially unilateralist intervention by invitation contains collective elements below its surface; the reverse applies for collective security, resulting in a hidden but identifiable link between the two concepts.

In a more contemporary context, this connection may lead invited interventions into the sphere of international conflicts. The notion of breaching international peace and security — the legal threshold demanded to invoke actions under Chapter VII — has undergone notable changes.¹¹²⁰ Since the beginning of the 1990s, it has become progressively more accepted that certain traditionally internal matters, be it a full-scale civil war or other forms of unrest, can constitute an event which the Security Council takes action on.¹¹²¹ This has meant that collective measures and intervention by invitation now function within the same field. With the new premise, can it be further concluded that intervention by invitation may become exhaustible in the face of a threat to international peace and security, particularly if the Security Council is unable to authorise military action?

The most recent development does suggest that the concepts are at least co-applicable.¹¹²² It even appears that intervention by invitation can be used as a temporary, immediate response to a breach of international peace, at least while the Security Council deliberates how best to assemble troops to combat the issue.¹¹²³ After all, the United Nations has no armed forces of its own at its disposal, and thus it must always take its

¹¹¹⁸ Shaun Walker, 'Ukraine clashes leave several dead and test Trump's Russia stance', *The Guardian*, 1 February 2017, <www.theguardian.com/world/2017/feb/01/ukraine-clashes-leave-several-dead-and-test-trumps-russia-stance>.

¹¹¹⁹ See Chapter III, Section 3.2.

¹¹²⁰ Franck, *Recourse to Force*, pp. 40-41.

¹¹²¹ *Ibid.*

¹¹²² Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', pp. 867-868.

¹¹²³ *Ibid.*, p. 857.

time to authorise an international coalition of the willing to execute collective security.¹¹²⁴ This exact scenario has been realised in Mali, where an invited intervention by France and collective armed measures authorised by the Security Council have both been invoked since 2013.¹¹²⁵

However, while the Mali matter shows that the two practices do not necessarily contradict each other, it is not quite enough to establish that intervention by invitation could act as a *de jure* alternative in the absence of Security Council authorisation. Of course, invited interventions did emerge as a factual replacement to collective security during the Council's biggest stalemates in the Cold War era: still, *de jure* and *de facto* are obviously not synonymous as concepts. Furthermore, it must be remembered that the breach or threat of international peace and security can only be determined by the Security Council.¹¹²⁶ If the Council is able to reach a decision over the existence of such a situation, it is not too far-fetched to imagine that it should be capable of deciding upon appropriate measures as well.

In any event, it would still seem that the concepts of intervention by invitation and collective security may be becoming more linked, especially after the military enforcement of the latter was bestowed to individual States rather than the previously planned UN troops. This is reflective of one of the first frameworks of foreign armed interventions, such as the Holy Alliance (1815), which has been interpreted to have encompassed both early intervention by invitation and collective use of force.¹¹²⁷ What is further, the connection acknowledges that attending to internal unrest and even conflicts is fundamental to maintain inter-State peace,¹¹²⁸ which is a direct call-back to post-Napoleon Europe.¹¹²⁹ Intervention by invitation and collective security may therefore, as overly poetic as it sounds, be coming full circle wherein historical themes begin to resurface on a modern stage.

Hence, as they stand in contemporary international law, intervention by invitation and collective security have had to cooperate in the present, which they may also have to do in the future.¹¹³⁰ This might lead to further internationalisation of intervention by invitation, which can cause the concept to become a servant of common values. As paradoxical as it may seem, this development may simultaneously move the doctrine

¹¹²⁴ Nils Blokker, 'Outsourcing the Use of Force: towards More Security Council Control of Authorized Operations?' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, Oxford, 2015), p. 203.

¹¹²⁵ *Mali*, SC Res. 2100, Preamble.

¹¹²⁶ UN Charter, Articles 24 and 39.

¹¹²⁷ See Chapter III, Section 3.2.

¹¹²⁸ Franck, *Recourse to Force*, pp. 40-41.

¹¹²⁹ Glennon, *Limits of War*, p. 13.

¹¹³⁰ Bannier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 868.

towards a more modern position,¹¹³¹ while also reanimating elements of its distant past. Such an evolution appears to have cast intervention by invitation into a state of confusion, for the already oxymoronic concept now must juggle additional juxtaposing elements. Current intervention by invitation can thus be described as being in a limbo, which will be dissected in Chapter V.

¹¹³¹ And away from the role of necessary evil that intervention by invitation played during the Cold War.

4. Conclusions: Finding Common Ground

Intervention by invitation is supposed to be based on the sovereign capacity of the host State — however, State practice on the matter has not truly reflected this premise. Rather, the blurred legal definition of the doctrine immediately affects it in its practical sphere. This is a natural outcome, since invited interventions re-emerged out of erratic practice which was accepted as evidence of the evolution of the norms on the use of force. In other words, the justification and practical aspects of invited interventions could be regarded as mirror images of one another, as one could not exist without the other.

In any event, as long as the doctrine of intervention by invitation allows for various, often contrasting interpretations, monitoring such interventions will be difficult. The best way to solve this dilemma would be to formulate clearer definitions as to how and when invited interventions can be executed. However, given the current State practice on the matter, this development appears unlikely. Similar to the justification of intervention by invitation, States appear to have opted for wide leeway when it comes to the practicalities of the concept.

As a result, while many general lines regarding the application of intervention by invitation have been drawn, there are equally many disputes over more detailed questions. This has been *inter alia* manifested in the questions concerning the identity of the inviter, limits of the intervention, and the issuing and retraction of the invitation itself. For the qualifications concerning intervention by invitation, the biggest debate has resided in how one should determine the legitimate representative of the inviting State. There have been undeniable attempts to dethrone the test of effective control and replace it with the qualification of democratic legitimacy. However, these ventures have only found success when applied in conjunction with collective security or other international elements. Ergo, the effective control test remains as the mean of assessing the inviting establishment's authority.

The circumstances in which invited interventions are enacted have not been immune to change. In this respect, the biggest recent development has been the gradual acceptance of intervening by invitation in certain non-international armed conflicts. This is possible in situations in which an international element exists, either in the form of Security Council involvement or the presence of global terrorism. Yet, issues persist even in this limited space. One still must identify the proper inviter when intervening upon invitation during a civil war. As the mean of doing so lies with the effective control test, a conundrum may present itself. Traditionally, the qualification of a civil war has signalled a loss of control, which means that determining the legitimate representative of the conflict State can be difficult and based upon arbitrary qualifications. Hence, invited

interventions and internal conflicts, while more compatible than before, are still far from a perfect match.

The changes in invited interventions do not stop here. The evolution of the doctrine has led to it being applied in many new circumstances, of which the most prominent are the Crimean secession in 2014 and the various military operations pursued to combat international terrorism. Of these two alternatives, the fight against terrorism has thus far proved to be the more fertile ground for modern invited interventions. Nevertheless, both prospects have certain issues to resolve and opportunities to explore. In one way or another, these scenarios will continue to affect the international community: how this effect lasts depends on multiple variables, which will be discussed in more detail in the next section.

Nonetheless, an intermediate notion can be made before moving on to these more detailed arguments. As of late, the practice of intervention by invitation has appeared to cross the line between internal and international, a process which has consequently instilled the doctrine with an identity crisis. Intervention by invitation previously appeared as the champion of sovereign interests, while more quietly catering to the common values of the international community. This position bestowed the concept with the role of the necessary evil, making it an unpleasant form of armed force that nonetheless served a bigger purpose. However, it now seems that doctrine is being harnessed to serve the common values more immediately, resulting in a mixture of unilateral and collective interests.

This development could lead to intervention by invitation becoming a superficially more pleasant concept, a positive outcome by some measures. However, it could also shake the already delicate balance within the global community. After all, no well-rounded storyline can be filled only with starry-eyed protagonists, as more antagonist parts are also necessary. In any event, the current role of intervention by invitation is debatable, as is its future position in international law.

Chapter V

The Current and Future Prospects of Intervention by Invitation

1. Consensual Use of Force and Modern Contexts

The previous two sections mapped out the peculiarities of intervention by invitation as a legal concept, as well as the riddles it faces in practice. To bring this analysis full circle, the present part of the thesis will focus on where these legal and practical aspects of the doctrine have led it to. With this objective in mind, this section covers the manner in which intervention by invitation currently appears in international law, and where this evolution may be headed in the future. The focus will hence be on intervention by invitation in the post-Cold War environment, to map out its evolution from the beginning of the 1990s to this day and beyond.

This task is not a leisurely one, for reasons relating to the nature of intervention by invitation. The concept portrays itself in an opaque manner which evades definite categorisation, very much making it a typical doctrine of international law.¹¹³² It is undeniably an applicable legal concept,¹¹³³ but at the same time it could be described as a mere love child of international politics that has managed to claim legitimacy in the eyes of the international community. And indeed, the doctrine was born out of necessity rather than focused law-making, which gives it certain much-needed political leeway, even if undesirable in many ways. In contrast with the core intent behind the general plan on the use of force,¹¹³⁴ on the surface intervention by invitation has few high-flying ideals to fulfil, making the doctrine a valuable tool for the willing to exhaust. As such, the doctrine has helmed the part of necessary evil, carrying along much political leverage and scattered legal validation.

Due to this premise, the concept has proved to be quite dynamic in the aftermath of the Cold War, partly because it had no choice but to be so. With the Cold War finished, the concept was no longer hanging on the power balance between the diametrically opposed United States and Soviet Union. This meant that the doctrine had ceased to serve the purposes of this global polarisation, leaving the concept untethered to the wider political context it was constantly forced to stabilise. As a result, the opportunity to

¹¹³² Byrne, 'Consent and the Use of Force', pp. 98 and 104.

¹¹³³ *Definition of Aggression*, Article 3(e); *Nicaragua*, para. 246; *Mali*, SC Res. 2100, Preamble; Crawford, *Brownlie's Principles*, p. 769; Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation', p. 189; Schachter, *International Law in Theory and Practice*, p. 114.

¹¹³⁴ UN Charter, Preamble.

experiment with intervention by invitation has opened up, giving the doctrine a chance to evolve past its former role.

And indeed, while the concept's immediate application since 1945 often followed firmly set superpower patterns, in recent times it has shown its adaptability on multiple occasions. The mere survival of the doctrine during revitalised Security Council activity and changed world politics following the end of the Cold War exemplifies this. In addition, it can be discerned that intervention by invitation has become a measure which now appears to be more accessible to a wider range of States, as the increased interventions in Africa have demonstrated.¹¹³⁵ These new circumstances have taken intervention by invitation into unprecedented situations. As mere cases of internal unrest have turned into secessionist movements and the threats of terrorist groups have risen from the national level to a global one, intervention by invitation has been invoked as one of the responses.¹¹³⁶

However, the reinvention of intervention by invitation has not emerged flawlessly. Many circumstances in which the doctrine has been invoked have been controversial, at times even unlawful.¹¹³⁷ Moreover, even though intervention by invitation has unmistakably begun to shun its Cold War role as a maintainer of superpower balance, it is yet to complete this transformation to the fullest. For instance, whenever the doctrine's limits are tested, such tests are likely to be conducted by the most powerful States for their own political ends, which at times will be narrowly visioned.¹¹³⁸ Therefore, despite its new-found appeal, intervention by invitation continues to carry the high likelihood of perverting the would-be globalist system on the use of force.

Hence, the doctrine appears to be in transition, which has caused its appearances in these modern circumstances to be debatable for many reasons. Thus, this section seeks to find out how intervention by invitation stands the test of evaluation in these contexts. The objective is to examine specific situations which may both provide fertile grounds and cause problems for intervention by invitation. The scenarios discussed here have been chosen because of their current relevance and plausible future importance. These issues have both gained much attention within the international community and have also been sporadically evolving in nature, which requires extensive research.

Given the current situation, the contents of the section have been structured thusly. Firstly, the section will discuss matters which fall under the theme of unifying unilateral

¹¹³⁵ de Wet, 'Modern Practice of Intervention by Invitation', pp. 981, 996 and 998.

¹¹³⁶ Record of the Security Council's 7125th Meeting, pp. 3-4; *The Situation in Mali*, SC Res. 2295, Preamble and paras. 14 and 35; Byrne, 'Consent and the Use of Force', pp. 97-98.

¹¹³⁷ *Territorial Integrity of Ukraine*, Preamble and paras. 1-2; Byrne, 'Consent and the Use of Force', pp. 97-98.

¹¹³⁸ Record of the Security Council's 7125th Meeting, pp. 3-4; Fox, 'Intervention by Invitation', pp. 837-838; Henderson, 'Editorial Comment', pp. 210-213.

and collective armed activities (Section 2). More specifically, these subtopics comprise the relationship between invited interventions and collective security, in addition to using consensual armed force to combat global terrorism. The section will hence examine whether intervention by invitation has managed to bridge the gap between individual State policies and commonly held values, an effort which could upend the concept's position.

Secondly, the matter of applying intervention by invitation during formerly non-international armed conflicts will be examined (Section 3). This means assessing not only traditional civil wars, but also secessionist conflicts such as the Crimean crisis. The objective is to discover if and how intervention by invitation has become applicable under such circumstances.

Thirdly, there will be an evaluation of how these changed circumstances have affected the pool of States which engage in consensual use of force as interveners (Section 4). While this ensemble has been exclusive in the past, the reinvented forms of intervention by invitation may bring the doctrine within the reach smaller countries as well. Such a development would move intervention by invitation even further away from its Cold War position, thus underlining its increasingly unpredictable status.

Fourthly, the chapter will close with a reminder from the realm of realism, which heavily dictates the likelihood of holding intervenors accountable for armed interventions. The likelihood of State responsibility for an invited intervention will thus be discussed, especially in light of the recent developments such as the increased involvement of smaller States (Section 5).

2. Intervention by Invitation in Aligning Collective and Unilateral Armed Activities

2.1. The Re-Emergence of Collective Security and Its Effect on Intervention by Invitation

2.1.1. The Two Concepts since the end of the Cold War

As a legal doctrine, intervention by invitation has been reinvigorated by the policies of the regular intervenors. Consequently, the concept has been tethered to political contexts, particularly of the Cold War era. The setting provided the doctrine with the grounds on which it built itself, in terms of both a legal and a political doctrine.¹¹³⁹ Given this premise, one might wonder where the concept has stood in the decades that have followed, in particular given the various and at times non-linear developments. Since intervention by invitation was so steadfastly established as a superpower tool in the early decades of the United Nations, could the turn in the relationships of the politically powerful entail the doctrine's inevitable downfall?

In the immediate aftermath of the Cold War's dissolution, some uncertainty did exist over the new position of intervention by invitation, amongst other superpower staples.¹¹⁴⁰ The need to resort to invited interventions should have wavered in conjunction with the bridge-building between the East and the West, especially since the lack of collective security has so heavily contributed to the doctrine's application.¹¹⁴¹ The international political struggle for allied governments between the United States and the Soviet Union appeared to have come to an abrupt end following the latter's collapse.¹¹⁴² This derogated the importance of intervention by invitation as a tool of superpower policy, begging the question: what relevance does the doctrine bear in the new world order?

The certain post-Cold War practice did indeed suggest that intervention by invitation could face severe decline. Such conclusions were *inter alia* drawn from the statements made by France, one the frequent proponents of the doctrine.¹¹⁴³ The State went on to claim that the days of the 'French Policy' were now in the past, meaning that it intended to forego the frequent practice of invited interventions; still, it ought to be noted that the State has since intervened in Mali.¹¹⁴⁴ Nonetheless, this example goes on to show that intervention by invitation had become quite a troublesome doctrine for the intervening

¹¹³⁹ Tanca, *Foreign Armed Intervention*, pp. 24-25; Brownlie, 'The United Nations Charter and the Use of Force', p. 501.

¹¹⁴⁰ Tanca, *Foreign Armed Intervention*, pp. 147-148.

¹¹⁴¹ *Ibid.*; de Wet, 'Modern Practice of Intervention by Invitation', p. 998.

¹¹⁴² Gray, *International Law and the Use of Force*, pp. 110 and 280.

¹¹⁴³ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', pp. 863-864.

¹¹⁴⁴ *Ibid.*, p. 864; *Mali*, SC Res. 2100, Preamble.

States, especially given the enhanced focus on the self-determination of the host State's people and the possible consequences that came with violating it.¹¹⁴⁵ Instead, much hope was placed in the United Nations and its revitalised chief political organ, the Security Council.¹¹⁴⁶

This brings us to the biggest complication faced by invited interventions in practice, the re-emergence of collective security.¹¹⁴⁷ This resurrection bears importance for several reasons. Firstly, to a certain extent, it was a manoeuvre towards the initial plan of the Charter, wherein the Security Council acts as the maintainer of international peace on the behalf of individual States.¹¹⁴⁸ Ideally, this should have reduced or even seen the end of unilateral uses of force altogether. Secondly, the new practice on collective security began to assert that internal conflicts could also present a threat or breach of international peace as entailed in Article 39 of the Charter.¹¹⁴⁹ In other words, while the Charter and its provisions on the use of force were planned with conflicts between States in mind, the Security Council has since deployed collective action in internal crises and conflicts as well.¹¹⁵⁰

This development has brought collective security close to invited interventions, creating a possible overlap or even conflict between the two.¹¹⁵¹ It hence appeared as if intervention by invitation was in danger of being eclipsed by the revitalised collective security, which finally appeared to be on its way to claim its position in international law. In the purely legal sense, no competition between the two concepts should exist. After all, actions undertaken under Chapter VII should still take precedence, meaning that collective security should supersede intervention by invitation under all circumstances.¹¹⁵² However, as it is well known, the norms of international law are not always symmetrically reflected in practice. This statement holds true for both intervention by invitation and collective security, as evidenced by their connection over the past few decades.

¹¹⁴⁵ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 863.

¹¹⁴⁶ Gray, *International Law and the Use of Force*, pp. 110-113.

¹¹⁴⁷ *Ibid.*, p. 113; UN Charter, Preamble and Articles 24 and 39.

¹¹⁴⁸ UN Charter, Articles 24 and 39-43; Gray, *International Law and the Use of Force*, pp. 254 and 264; Cassese, *International Law*, pp. 339-340.

¹¹⁴⁹ Franck, *Recourse to Force*, p. 40-41; Gazzini, *Changing Rules*, pp. 31-32.

¹¹⁵⁰ Franck, *Recourse to Force*, p. 40-41; *Somalia*, SC Res. 794, para. 10; *Libya*, SC Res. 1973, Preamble and para. 4.

¹¹⁵¹ *Mali*, SC Res. 2100, Preamble; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 856-858.

¹¹⁵² UN Charter, Articles 1(1), 24-25 and 103.

2.1.2. Establishing a Constructive Relationship: the Current Co-Operation Between Invited Interventions and Collective Security

In the late 1980s and early 1990s, collective security was set to become more prominent in international relations.¹¹⁵³ However, subsequent practice has not echoed this optimism, leaving the concept's newfound position ambiguous.¹¹⁵⁴ As a result, while collective security has now been awakened from its decades-long slumber, it is yet to be applied in the extent allowed by the Charter's provisions.¹¹⁵⁵ Therefore, collective security has indeed claimed a position, but not as the unwavering upholder of international peace it was first envisioned as during the UN Charter's drafting process.¹¹⁵⁶

This finding can be attributed to two main factors. Firstly, as noted earlier, the idea of armed forces under the control of the United Nations has failed, and at this point it seems unlikely that such aspirations could ever be achieved.¹¹⁵⁷ Instead, the Council has had to rely on individual States in order to carry out both peacekeeping missions and full-fledged interventions, which has partially compromised the idea behind true collective security.¹¹⁵⁸ Ultimately, collective armed measures are both decided and acted on by individual States rather than a collective entity, which inevitably waters down the original intention of the Charter.¹¹⁵⁹

Secondly, the process of improving the relationship between the East and the West has suffered several setbacks along the way, weighing down the work of the Security Council in the process.¹¹⁶⁰ While a full relapse into Cold War politics is yet to appear, permanent members of the Security Council rarely agree completely when it comes to situations demanding the organ's attention.¹¹⁶¹ As a result, military action by the Security Council, especially swift action, simply cannot be taken for granted. Many incidents exemplify this, including the current situation in the Syrian Civil War, which is yet to be resolved by the Council despite containing many elements that truly threaten international peace and security.¹¹⁶²

¹¹⁵³ Gazzini, *Changing Rules*, p. 63.

¹¹⁵⁴ Gray, *International Law and the Use of Force*, p. 254.

¹¹⁵⁵ Franck, *Recourse to Force*, pp. 21-25; Gazzini, *Changing Rules*, p. 63.

¹¹⁵⁶ Gazzini, *Changing Rules*, p. 63.

¹¹⁵⁷ *Ibid.*, pp. 35-37.

¹¹⁵⁸ Franck, *Recourse to Force*, pp. 23-24.

¹¹⁵⁹ Gray, *International Law and the Use of Force*, p. 254.

¹¹⁶⁰ Bardo Fassbender, 'The Security Council: Progress is Possible but Unlikely', in Antonio Cassese (ed), *Realizing Utopia: the Future of International Law* (Oxford University Press, Oxford, 2012), pp. 56-57.

¹¹⁶¹ *Ibid.*

¹¹⁶² Henderson, 'Editorial Comment', p. 214; *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 2249, Preamble.

For these reasons, collective security has been forced to cooperate with intervention by invitation instead of dethroning it. In fact, given the many conundrums that hinder the deployment of military activities under Chapter VII, it appears that collective security may have to rely on unilateral force upon request, especially in the initial phases of the military intervention.¹¹⁶³ After all, whereas collective security remains difficult to enforce, intervention by invitation has retained its political flexibility and easier applicability, as seen in the 2013 intervention in Mali.¹¹⁶⁴ Such flexibility may provide vital assistance to collective security, even when armed measures under Chapter VII have been successfully authorised by the Security Council.

Such developments have *inter alia* occurred in the current Malian crisis, a conflict in which both collective security and intervention by invitation have been invoked.¹¹⁶⁵ When the crisis first escalated in late 2012, the Security Council was comparatively quick on its feet and decided that a collective armed intervention was necessary to resolve the situation.¹¹⁶⁶ Accordingly, the Council declared the presence of a threat to international peace and security, authorised the use of armed measures under Article 42 of the Charter and took to forming a special support mission to enact the authorisation to use force.¹¹⁶⁷ However, despite the quick consensus on the matter, it also became clear that the armed forces working under the umbrella of the Security Council's authorisation could not be deployed fast enough to solve the crisis.¹¹⁶⁸ For these reasons, the Malian authorities chose to issue a direct plea to France in early 2013, asking it to stage an armed intervention. France decided to respond to this request and was able to commence the intervention immediately, while the AFISMA intervention planned by the Security Council followed sometime after.¹¹⁶⁹

The Mali intervention aptly showcases the tentatively constructive connection between intervention by invitation and collective security. Even though one could state that France perhaps blindsided the Security Council by staging an intervention of its own, the Council welcomed the unilateral action and saw it as an enhancement rather than a detriment to its own mission.¹¹⁷⁰ This marks an occasion when the Security Council not only expressed acceptance towards intervention by invitation, but also saw the concept as an asset that could be used to help with its own work. In turn, this suggests that the two concepts can

¹¹⁶³ *Mali*, SC Res. 2100, Preamble.

¹¹⁶⁴ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', pp. 857 and 873-874.

¹¹⁶⁵ *Ibid.*, p. 868; *Mali*, SC Res. 2085, para. 9; *Mali*, SC Res. 2100, Preamble.

¹¹⁶⁶ *Mali*, SC Res. 2085, Preamble and para. 9.

¹¹⁶⁷ *Ibid.*, para. 9.

¹¹⁶⁸ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', pp. 857 and 867.

¹¹⁶⁹ *Ibid.*

¹¹⁷⁰ *Mali*, SC Res. 2100, Preamble.

be co-applicable instead of being sworn, formidable enemies.¹¹⁷¹ Such a finding is not too surprising given the historical overlap between the doctrines: these connections can be traced back to the early 1800s, marking a historical link as well as a contemporary one.¹¹⁷²

2.1.3. Comparing Collective Security and Invited Interventions in Practice: the Strengths and Weaknesses of the Concepts

While it has been possible to strike a tentative balance between intervention by invitation and collective security, their current incarnations are not fully compatible soulmates. They are often used to serve very different objectives, meaning that their co-application, while possible, cannot always be taken for granted. For instance, intervention by invitation often appears as an alternative when collective security fails, as illustrated by the current Syrian Civil War.¹¹⁷³ Hence, it may be impossible to apply the concepts simultaneously in particular circumstances.

This means that the intervention by invitation and collective security, while not diametrically opposed, may still compete for time on the global stage, as States evaluate which concept fits their policies better. Upon making such deliberations, one is likely to come across a fundamental question: which concept is more durable when it comes to resolving issues and unrests around the world? At first glance, one might make a snap judgment and declare collective security to be the clear victor, given its intended position in the Charter's regime. However, closer examination allows one to see that the ultimate choice is more difficult than immediate appearances might suggest.

After all, despite differences on the surface, intervention by invitation and collective security do share notable underlying common factors. These factors are not completely limited to their shared history. In fact, the two concepts currently suffer from similar practical issues, many of which relate to the role of international politics.¹¹⁷⁴ This may come as a surprise, as one might think that collective security, the supposed centre piece

¹¹⁷¹ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 868.

¹¹⁷² See Chapter III, Section 3.2. and Chapter IV, Sections 3.1.1. and 3.3.3.

¹¹⁷³ de Wet, 'Modern Practice of Intervention by Invitation', p. 983; Henderson, 'Editorial Comment', pp. 211-213; Ruys and Verlinden, 'Digest of State Practice 1 July — 31 December 2014', pp. 137 and 139; Tom Ruys, Luca Ferro and Nele Verlinden, 'Digest of State Practice 1 July — 31 December 2015', p. 154; Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, Annex; Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, 23 September 2014, UN Doc. S/2014/695; BBC, 'Syria crisis: Where key countries stand', *BBC News*, 30 October 2015, <www.bbc.com/news/world-middle-east-23849587>.

¹¹⁷⁴ Dixon, *Textbook on International Law*, pp. 7-8 and 345; Gray, *International Law and the Use of Force*, p. 255; Brownlie, 'The United Nations Charter and the Use of Force', pp. 501-502; Tanca, *Foreign Armed Intervention*, pp. 22-25.

of the Charter, ought to be much more resistant to such political aspirations. However, as long as collective measures are decided upon by the Security Council, a political organ and an exclusive club of sovereign States, such challenges are bound to persist.¹¹⁷⁵ This locates collective security adjacent to intervention by invitation, in many respects.

When comparing the two concepts in a legal sense, collective security generally offers a far wider scope of available measures than intervention by invitation.¹¹⁷⁶ The wording of the Charter allows the Security Council nearly unlimited discretion to decide on what constitutes a violation of Article 39, and also what measures, military or non-military, should be undertaken in response.¹¹⁷⁷ The only restrictions are that the Council must act in accordance with the purposes and principles of the United Nations,¹¹⁷⁸ a statement which can only be described as vague. Collective security can thus be applied rather indiscriminately in different circumstances, including even non-international armed conflicts.¹¹⁷⁹

Of course, this flexibility has a downside in relation to ending an armed intervention under Chapter VII. Similar to authorising armed measures, the decision to retract such authorisation must be conducted via the Security Council.¹¹⁸⁰ Since no Resolution may be opposed by any of the organ's five permanent members, this can result in the impasse known as the reverse veto.¹¹⁸¹ The reverse veto is a scenario wherein a permanent member blocks the adoption of a Resolution to end a collective armed intervention, possibly upholding the mandate to use force indefinitely.¹¹⁸² Of course, the threat of reverse veto is yet to appear outside speculation, leaving the practice on collective security free of such issues.¹¹⁸³

In contrast, intervention by invitation is hindered by various conceptual ambiguities, which have resulted in the practice of the doctrine being quite trying.¹¹⁸⁴ The concept, while permissible, should thus have limited grounds for its application.¹¹⁸⁵ However, intervention by invitation does have more political flexibility than collective security, which is subjected to the constant whims of the Security Council's members.¹¹⁸⁶ This denotes that both commencing and ending an invited intervention can be much easier.

¹¹⁷⁵ Dixon, *Textbook on International Law*, p. 345.

¹¹⁷⁶ UN Charter, Articles 41-42.

¹¹⁷⁷ *Ibid.*, Articles 24, 39 and 41-42; Gazzini, *Changing Rules*, p. 10.

¹¹⁷⁸ UN Charter, Article 24(2).

¹¹⁷⁹ Franck, *Recourse to Force*, pp. 40-41.

¹¹⁸⁰ UN Charter, Article 27.

¹¹⁸¹ *Ibid.*, Article 27(3); Gazzini, *Changing Rules*, p. 52.

¹¹⁸² Gazzini, *Changing Rules*, p. 52-53.

¹¹⁸³ *Ibid.*, pp. 52-54.

¹¹⁸⁴ Tanca, *Foreign Armed Intervention*, pp. 22-23.

¹¹⁸⁵ *Ibid.*, pp. 22-24.

¹¹⁸⁶ UN Charter, Articles 24 and 27.

Still, invited interventions have been riddled with issues relating to the invitation to intervene, showing that ending such an intervention can actually be difficult.¹¹⁸⁷

In the end, both doctrines come with their batch of issues, some of which are shared while others are particular. Thus, rather than simply abstractly comparing the concepts, one could benefit from projecting them against the backdrop of actual State practice. Unfortunately, the global community does have a recent case which contrasts the use of intervention by invitation and collective security: Libya. The State has faced continuous upheavals since the commencement of the Arab Spring in 2011, with no end currently in sight.¹¹⁸⁸ As a result of this confusion, the State has also been subject to numerous armed interventions ever since, varying both in range and legal justification.

To begin this examination of Libya, we should return to 2011 and the events which started the myriad issues currently engulfing the State. During the first months of this year, the escalating unrest and eventual civil war began to attract international attention, resulting in the United Nations becoming involved in the matter.¹¹⁸⁹ Consequently, in March 2011, the Security Council famously authorised collective use of force in Libyan territory with Resolution 1973.¹¹⁹⁰ The goal and intention of the Resolution was *inter alia* to protect the population residing in Libya.¹¹⁹¹ An international coalition headed by NATO was quickly discharged for this purpose; however, the military intervention which followed took additional twists and turns, effectively extending or even undermining the letter of Resolution 1973.¹¹⁹²

Ultimately, the Libyan Civil War resulted in the ousting and killing of the dictator Gaddafi, bringing forth a regime change in the country, which was acknowledged while the initial collective intervention was still on-going.¹¹⁹³ Given the course of the war, one would find it very difficult to argue that the intervention had nothing to do with these political upheavals within the country.¹¹⁹⁴ Therefore, the military intervention pursuant to Resolution 1973 also undeniably crossed the limitations set by the Security Council,

¹¹⁸⁷ *DRC v. Uganda*, paras. 44, 46-47 and 49-51.

¹¹⁸⁸ James Robbins, 'How West's limited intervention failed Libya', *BBC News*, 18 February 2015, <www.bbc.com/news/world-africa-31521282>.

¹¹⁸⁹ Fox, 'Intervention by Invitation', pp. 837-838.

¹¹⁹⁰ *Libya*, SC Res. 1973, para. 4.

¹¹⁹¹ *Ibid.*

¹¹⁹² Blokker, 'Outsourcing the Use of Force', pp. 204-205; Thakur, 'Reconfiguring the UN System', p. 196.

¹¹⁹³ *Report of the Credentials Committee*, para. 4; *Credentials of Representatives to the Sixty-sixth Session of the General Assembly*; BBC, 'Arab uprising: Country by country - Libya', 16 December 2013, <www.bbc.com/news/world/12482311>; Fox, 'Intervention by Invitation', p. 838; Blokker, 'Outsourcing the Use of Force', pp. 204-205.

¹¹⁹⁴ Blokker, 'Outsourcing the Use of Force', pp. 204-205; Thakur, 'Reconfiguring the UN System', pp. 195-196.

which raised questions about the manner in which the operation was conducted.¹¹⁹⁵ This has resulted in the intervention being regarded rather negatively, as it arguably did not serve the objectives of the authorisation.¹¹⁹⁶

This is naturally an undesirable outcome. Since the justification of the military intervention was based on Chapter VII, its legal basis is unproblematic; one might hope that the actual intervention would have panned out similarly. Still, it would be difficult to argue that the intervention was successful in retrospect. Although the Security Council authorisation did not call for regime change in the target country, the intervention directly contributed to such ends.¹¹⁹⁷ Such results not only did a disservice to the goals of Resolution 1973, but also saw activity under a UN mandate potentially dictate the political future of one its members. While collective security has been given almost unlimited power under the UN Charter,¹¹⁹⁸ one might question if such developments serve the organisation's purposes. What is further, the newly-installed National Transition Council failed to gain a footing in Libya, thus striking the first tunes of yet another situation of disarray in the country.¹¹⁹⁹

And indeed, the result of the military intervention was not the beacon of hope it was paraded as in the immediate light of Gaddafi's ousting. Libya has faced further destabilisation, including the ISIS terror group, which has seized control of various cities around the country.¹²⁰⁰ In fact, it could be stated that Libya's situation has become weaker in the aftermath of the 2011 military intervention, since the country has been plunged into yet another civil war.¹²⁰¹ The position of the United Nations Support Mission in Libya (UNSMIL), a political mission established in the wake of the 2011 military intervention, has been left in turmoil due to these developments.¹²⁰² The crisis has caused UNSMIL to

¹¹⁹⁵ Julian Ku, 'Where Is the International Law Criticism of the Libya Intervention?', *Opinio Juris*, 25 October 2011, <opiniojuris.org/2011/10/25/where-is-the-international-law-criticism-of-the-libyan-intervention/>.

¹¹⁹⁶ Ibid.

¹¹⁹⁷ Ibid.

¹¹⁹⁸ UN Charter, Articles 24 and 39.

¹¹⁹⁹ Philippe Droz-Vincent, 'Prospects for "Democratic Control of the Armed Forces"?: Comparative Insights and Lessons for the Arab World in Transition' (2014) *Armed Forces & Society* 696, p. 707.

¹²⁰⁰ *Libya*, SC Res. 2214, 27 March 2015, UN Doc. S/RES/2214, Preamble; *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 2253, 17 December 2015, UN Doc. S/RES/2253, Annex I, para (a); *The Situation in Libya*, SC Res. 2292, 14 June 2016, UN Doc. S/RES/2292, Preamble; BBC, 'Libya Profile - Timeline', *BBC News*, 24 January 2018, <www.bbc.com/news/world-africa-13755445>.

¹²⁰¹ BBC, 'Libya Profile - Timeline', *BBC News*, 24 January 2018.

¹²⁰² *Report on the United Nations Support Mission in Libya*, 26 February 2014, UN Doc. S/2014/131, paras. 78-81.

falter in its persisting attempts to control the situation in Libya, as the country has been thrust into an ever-deepening chaos, with ISIS as one its factions.¹²⁰³

This has led to the Libyan authorities asking for foreign assistance, which by August 2016 had culminated in blatant intervention by invitation,¹²⁰⁴ executed by the United States in the form of airstrikes against ISIS.¹²⁰⁵ Moreover, it has been reported that during this time British and French troops were also placed on Libyan soil, but their presence was mostly kept out of the public eye.¹²⁰⁶ The United States, however, has continued its public military presence, since the country staged notable armed activities in Libya in 2017, apparently with the continued purpose of countering the threat of ISIS.¹²⁰⁷ The activities have continued in conjunction with the aforementioned UN efforts to stabilise the country,¹²⁰⁸ forcing consensual use of force and Security Council action to cooperate once more.¹²⁰⁹ As an additional curiosity, invited interventions have taken place despite the clear power vacuum in Libya, in which the mantle of the country's legitimate representative has been fiercely contested.¹²¹⁰ Of course, it bears reminding that the Security Council has continued to pledge its support for the internationally-recognised government, which should cause the biggest concerns over the legitimate representative to subside.¹²¹¹

Overall, the current crisis in Libya concerns numerous legal issues which have become entangled over the years. The conundrum truly began after collective use of force was

¹²⁰³ *The Situation in Libya*, SC Res. 2291, 13 June 2016, UN Doc. S/RES/2291, para. 1; BBC, 'Libya Profile - Timeline', *BBC News*, 24 January 2018; Record of the Security Council's 7708th Meeting, 8 June 2016, UN Doc. S/PV.7708, p. 3.

¹²⁰⁴ However, it should be noted that the US had executed armed measures in Libya in early 2016 as well, but the it was left ambiguous if Libya had explicitly consented to these activities, see Tom Ruys, Luca Ferro and Nele Verlinden, 'Digest of State Practice, 1 January —30 June 2016' (2016) 3 *Journal on the Use of Force and International Law* 290, pp. 301-302.

¹²⁰⁵ Missy Ryan and Sudarsan Raghavan, 'U.S. strikes Islamic State stronghold in Libya, expanding campaign against militant group', *The Washington Post*, 1 August 2016, <www.washingtonpost.com/news/checkpoint/wp/2016/08/01/united-states-strikes-islamic-state-stronghold-in-libya-expands-campaign-against-militant-group/?utm_term=.d7d05445d77a>.

¹²⁰⁶ Ibid.; Ruys, Ferro and Verlinden, 'Digest of State Practice, 1 January —30 June 2016', p. 302.

¹²⁰⁷ Ryan Browne, 'US strikes Libya for first time under Trump', *CNN News*, 24 September 2017, <edition.cnn.com/2017/09/24/politics/us-strikes-libya-trump/index.html>.

¹²⁰⁸ *Inter alia The Situation in Libya*, SC Res. 2291, para. 1; *The Situation in Libya*, SC Res. 2323, 13 December 2016, UN Doc. S/RES/2323, para.1.

¹²⁰⁹ However, the Council has not authorised military measures on the matter since the 2011 intervention.

¹²¹⁰ Ryan and Raghavan, 'U.S. strikes Islamic State stronghold in Libya, expanding campaign against militant group', *The Washington Post*, 1 August 2016; BBC, 'Libya Profile - Timeline', *BBC News*, 24 January 2018; *Libya*, SC Res. 2259, 23 December 2015, UN Doc. S/RES/2259, para. 3.

¹²¹¹ *Inter alia Libya*, SC Res. 2259, para. 3; *The Situation in Libya*, SC Res. 2362, 29 June 2017, UN Doc. S/RES/2362, Preamble.

enacted to resolve the humanitarian crisis within the State. The armed intervention pursued as a result was not confined to the perimeter set in the authorisation of the Security Council, resulting in additional developments within the target State.¹²¹² Consequently, Libya failed to stabilise itself in the aftermath of the intervention, which led to further armed activities, this time in the form of intervention by invitation.¹²¹³ Notably, in this case, intervention by invitation has been deployed due to previous trial and error at the hands of collective security, possibly lacking the doctrines' relation in this matter with a slightly more antagonistic taste.

Of course, the crisis in Libya is still very much in the making, and rapid changes may take place. Further analysis on this case has to wait until the developments have advanced further, especially given the chaotic situation in Libya at the moment.¹²¹⁴ Still, certain observations can be made at a more general level. Despite its notable difficulties and even glaring failures, collective security remains the primary instrument when it comes to intervening. This is exemplified not only by the developments in Libya, but also in Syria as well. Although the Security Council has been unable to authorise a collective military intervention in the latter State, the fact that States continuously bring the matter to the Council shows that they consider collective security to be the first alternative. Indeed, such statements have been made over unilateral armed activities, invited interventions included, undertaken in the absence or alongside collective measures.¹²¹⁵

Naturally, the primacy of collective security cannot remain on unimplemented level forever. After all, the world is constantly confronted by crises demanding military attention, and at a certain stage, unilateral measures, such as intervention by invitation, may have to concede the role they currently hold. Simply put, the current legal framework was not built to allow unilateral measures such as leverage, and thus they may eventually unravel due to the lack of definite legal structures.

2.2. The International Fight Against Terrorism and Consensual Use of Force

2.2.1. Intervention by Invitation and Terrorism Post-2001

Intervention by invitation has often been a manifestation of the world politics and its most influential actors. Consequently, the concept has made its way into one of the notable current venues of armed force: military actions pursued against international

¹²¹² Blokker, 'Outsourcing the Use of Force', pp. 204-205.

¹²¹³ Ryan and Raghavan, 'U.S. strikes Islamic State stronghold in Libya, expanding campaign against militant group', *The Washington Post*, 1 August 2016.

¹²¹⁴ BBC, 'Libya Profile - Timeline', *BBC News*, 24 January 2018.

¹²¹⁵ John, 'How the World Reacted to President Donald Trump's Air Strike on Syria', *Time*, 7 April 2017; *Mali*, SC Res. 2100, Preamble.

terrorist organisations. From the legal perspective, the international fight against terrorism causes multiple complications. The political responses by States to the attacks and threats of terrorist organisations have tended to forego the legal conditions on various levels of regulation.¹²¹⁶ This is not only reflected in the use of force, which saw quick and debatable expansions of pertinent legal criteria in the aftermath of the 9/11 attacks,¹²¹⁷ but also other norms of international law relating to individual rights and liberties.¹²¹⁸

This evolution of legal standards — or depending on one's perspective, dismissal — has had its effect on intervention by invitation as well. The doctrine has appeared more or less explicitly in arguments over international terrorism, wherein its legal limitations have at times been interpreted quite liberally.¹²¹⁹ However, the doctrine's appearances in combating terrorism may be hard to track, as the legal justifications offered by States often either overlap with other grounds for armed force or are practically non-existent. Nevertheless, some remarks about intervention by invitation in this context can be made, which will be the objective of this section.

2.2.2. The First Wave of Invited Interventions: International Terrorism and Targeted Killings

Regardless of one's views on it, the term 'War on Terror' coined by the United States has had a massive impact since its introduction in the wake of the 9/11 attacks in 2001. However, no matter how much such a term is tossed around in political rhetoric, the fight against terrorism is still not a traditional war.¹²²⁰ It is not a fight that is waged on battlefields with clear territorial or time limits and a definite set of enemies.¹²²¹ Instead, it is a threat which requires constant attention, international co-operation and in some cases the use of military force.¹²²² This has brought about the merging of doctrines of

¹²¹⁶ Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 *The European Journal of International Law* 993, p. 993.

¹²¹⁷ *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 1368, Preamble; *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 1373, Preamble; Peter J. van Krieken, *Terrorism and the International Legal Order* (the Hague, T.M.C. Asser Press, 2002), pp. 4-6.

¹²¹⁸ Ewen Macaskill and Gabriel Dance, 'NSA Files: Decoded - What the Revelations Mean for You', *The Guardian*, 1 November 2013, <www.guardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded>.

¹²¹⁹ Henderson, 'Editorial Comment', pp. 210-212.

¹²²⁰ Paul W. Kahn, 'Imagining Warfare' (2013) 24 *European Journal of International Law* 199, p. 199-200 and 221.

¹²²¹ *Ibid.*, pp. 199-200.

¹²²² *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 1368, Preamble; *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 1373, Preamble.

warfare and law enforcement, which has had an effect on various legal ventures concerning the use of force.¹²²³ Among other legal doctrines, this setting has also evoked the need to exhaust intervention by invitation.

In the public eye, the frequent application of invited interventions in response to terrorism has been prominent in targeted killings, a concept entailing confined military operations aimed at neutralising an assigned target.¹²²⁴ This concept has been put to use on the territories of Pakistan, Yemen and Somalia among others.¹²²⁵ Most often, the intervenor has been the United States, although Israel has also staged targeted killings on several occasions.¹²²⁶ Recent additions to this ensemble include the United Kingdom, which as of 2015, appears to be executing targeted killings outside the realm of an armed conflict.¹²²⁷ The purpose of these operations has often been to target individuals linked with international terrorist organisations such as al-Qaida.¹²²⁸ Because of these objectives, certain publicised targeted killings have been welcomed by or silently consented to by many members of the international community.¹²²⁹ Still, certain issues of this practice have caught the attention of States and international commentators alike, leaving the general picture of the concept controversial.

To examine this controversy further, we should discuss the modern history of the practice itself. Not surprisingly, the most public proponent of targeted killings has been the United States, which has advocated the concept during and following its quest to finish al-Qaida in Afghanistan and Iraq in the early 2000s.¹²³⁰ Due to the risk of heavy losses being more immediately felt in the US at the time, deploying troops had become an

¹²²³ Kahn, 'Imagining Warfare', pp. 199-200.

¹²²⁴ Nils Melzer, *Targeted Killing in International Law* (New York, Oxford University Press Inc., 2008), pp. 3-4.

¹²²⁵ Kevin H. Govern, 'Operation Neptune Spear: Was Killing Bin Laden a Legitimate Military Objective?', in Claire Finkelstein, Jens David Ohlin and Andrew Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford, Oxford University Press, 2012), p. 351; Byrne, 'Consent and the Use of Force', p. 97.

¹²²⁶ Gabriella Blum and Philip Heymann, 'Law and Policy of Targeted Killing' (2010) 1 *Harvard National Security Journal* 145, p. 151; Jason W. Fisher, 'Targeted Killings, Norms, and International Law' (2007) 45 *Columbia Journal of Transnational Law* 711, pp. 712-714.

¹²²⁷ Christine Gray, 'Targeted Killing Outside Armed Conflict: a New Departure for the UK?' (2016) 3 *Journal on the Use of Force and International Law* 198, p. 198.

¹²²⁸ Blum and Heymann, 'Law and Policy of Targeted Killing', pp. 150-151; Melzer, *Targeted Killing in International Law*, pp. 40-41; Govern, 'Operation Neptune Spear', p. 351.

¹²²⁹ See for instance the reaction of Secretary-General Ban Ki-Moon to the killing of bin Laden in 2011, *Secretary-General, Calling Osama bin Laden's Death 'Watershed Moment', Pledges Continuing United Nations Leadership in Global Anti-Terrorism Campaign*, United Nations Press Release, 2 May 2011, SG/SM/13535, <www.un.org/press/en/2011/sgsm13535.doc.html>.

¹²³⁰ Melzer, *Targeted Killing in International Law*, pp. 40-41; Shekell, 'The Legality of the United States' Use of Targeted Killings', p. 313.

increasingly undesirable option for the State.¹²³¹ Thus, following the negative public responses evoked by the Iraq War in particular, the United States sought to combat terrorism through the use of surgical operations short of full-scale war.¹²³² Consequently, once the initial assault on al-Qaida was finished, the US took to asserting its military presence in various States in the Middle East, but this time in a more confined manner. Instead of waging traditional war, the country sought to maintain itself on standby in States it perceived to hold terrorists, and then respond accordingly, albeit limitedly, should any terrorist threats arise.¹²³³ Very often the appropriate response was deemed to be an operation which disposed of the suspected terrorist, a practice commonly known as targeted killing.¹²³⁴

When these targeted killings began to take place at full steam, the US also began to abandon the 'War on Terror' rhetoric in its politics: however, the sentiment behind its actions remained the same.¹²³⁵ Still, the State showed much more willingness to cooperate with other countries on the matter, and thus some of the US targeted killings have been executed with the consent of the territorial States involved: examples vary from Somalia to Yemen.¹²³⁶ However, some States have been unwilling to accept foreign military intrusions of any kind. This has led to them renouncing the attempts by the United States or retracting invitations issued earlier, riddling these supposed invitations with issues.¹²³⁷

Traditionally, such denial of cooperation would have severely hindered the opportunities for seeking terrorists residing abroad: however, the advancement of technology and military equipment has allowed select States, those which possess such assets, an easy access to armed activities in another country without their consent.¹²³⁸ This is well exemplified by drones, which have been used by the United States to conduct

¹²³¹ Jeffrey Pickering, 'Dangerous Drafts? A Time-Series, Cross-National Analysis of Conscription and the Use of Military Force, 1946-2001' (2011) 37 *Armed Forces & Society* 119, pp. 119-120.

¹²³² Miroslav Nincic, 'Preventive War and Its Domestic Politics', in Kerstin Fisk and Jennifer M. Ramos (eds), *Preventive Force: Drones, Targeted Killing, and the Transformation of Contemporary Warfare* (New York, New York University Press, 2016), pp. 70-71 and 82-83; Byrne, 'Consent and the Use of Force', pp. 97 and 102-103.

¹²³³ Byrne, 'Consent and the Use of Force', pp. 102-103.

¹²³⁴ Melzer, *Targeted Killing in International Law*, pp. 40-41.

¹²³⁵ Joe Boyle, 'Making Sense of Self-Defence in the War on Terror' (2014) 1 *Journal on the Use of Force and International Law* 55, p. 56.

¹²³⁶ Byrne, 'Consent and the Use of Force', pp. 97.

¹²³⁷ Ibid., pp. 119 and 124-125; Jon Boone, 'Bin Laden Killing: Official Report Criticises Pakistan and US', *The Guardian*, 9 July 2013, <www.guardian.com/world/2013/jul/08/osama-bin-laden-pakistan-criticised>.

¹²³⁸ Jordan J. Paust, 'Remotely Piloted Warfare as a Challenge to the *Jus ad Bellum*', in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford, Oxford University Press, 2015), pp. 1103-1104 and 1108-1109.

targeted killings of individuals purportedly involved with terrorist organisations, sometimes without clear host State consent.¹²³⁹ The use of this modern technology has enabled quickly executable military operations, stretching the scale of different forms of targeted killings.¹²⁴⁰

With the wide scope of targeted killings, the practice has become a common staple in the US foreign policy and in various foreign territories at that.¹²⁴¹ Examples of the practice range from the execution of Osama bin Laden in 2011 to the continuous drone attacks in various States.¹²⁴² The US argument about its policy has rested on several premises, from self-defence to intervention by invitation, with a bit of humanitarian intervention on the side for good measure.¹²⁴³ In the first stages following the 9/11 attacks, both the legal and political rhetoric rested on what the country purported its inherent right to self-defence to be, even if this meant militarily intervening in States not immediately connected to the terrorist organisations it pursued.¹²⁴⁴ The US position on self-defence has been based on the ‘unwilling or unable’ argument, according to which a State bears responsibility for the actions of terrorist groups residing in its territory unless it has taken adequate measures against them.¹²⁴⁵ However, such an approach can be problematic from the viewpoint of State responsibility, which normally demands the terrorist organisation to be at least a *de facto* organ of the State in order to create accountability.¹²⁴⁶

¹²³⁹ Byrne, ‘Consent and the Use of Force’, p. 119.

¹²⁴⁰ Paust, ‘Remotely Piloted Warfare as a Challenge to the *Jus ad Bellum*’, pp. 1098-1099 and 1105-1107.

¹²⁴¹ Craig Martin, ‘Going Medieval: Targeted Killing, Self-Defence and the *Jus Ad Bellum* Regime’, in Claire Finkelstein, Jens David Ohlin and Andrew Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford, Oxford University Press, 2012), p. 223.

¹²⁴² Avery Plaw and Joao Franco Reis, ‘The Contemporary Practice of Self-Defense: Evolving Toward the Use of Preemptive or Preventive Force’ in Kerstin Fisk and Jennifer M. Ramos (eds), *Preventive Force: Drones, Targeted Killing, and the Transformation of Contemporary Warfare* (New York, New York University Press, 2016), pp. 242-243; Byrne, ‘Consent and the Use of Force’, p. 97; Mark V. Vlasic, ‘Assassination & Targeted Killing – A Historical and Post-Bin Laden Legal Analysis’ (2011-2012) 43 *Geo. J. Int’l L.* 259, pp. 261-262 and 312-313.

¹²⁴³ Byrne, ‘Consent and the Use of Force’, pp. 97-98; Blum and Heymann, ‘Law and Policy of Targeted Killing’, pp. 155-156 and 164; Shekell, ‘The Legality of the United States’ Use of Targeted Killings’, pp. 315-320 and 324.

¹²⁴⁴ Melzer, Targeted Killing in International Law, pp. 40-42.

¹²⁴⁵ Claus Kreb, ‘Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law and the Use of Force’, (2014) 1 *Journal on the Use of Force and International Law* 11, pp. 44 and 48; Henderson, ‘Editorial Comment’, p. 215.

¹²⁴⁶ Gazzini, Changing Rules, pp. 186-187.

This legal reality has necessitated the consent of the territorial State, upon which the United States has more or less frequently relied in recent years.¹²⁴⁷ Consent became further necessary as the threat of terrorist organisations became less imminent, begging the question whether actions against such groups could even politically be labelled as appropriate responses to armed attacks.¹²⁴⁸ From the legal perspective though, the consent of the State hosting the potential terrorists is generally absolutely vital.¹²⁴⁹ Unless the said State can be held internationally liable for the actions of the groups residing in its territory, any foreign use of force would violate Article 2(4) of the Charter.¹²⁵⁰

However, while extracting the consent of the host State is necessary, for many military operations it is not enough to fully justify the use of armed force. This is because such armed force is often applied with the intention of killing the subjects rather than simply aiming to take them into custody.¹²⁵¹ Such deprivation of life is only permitted in the context of an armed conflict, where lethal force is allowable against combatants in accordance with certain restrictions set out in international humanitarian law.¹²⁵² Outside this context, however, it is the human rights regime that becomes applicable instead.¹²⁵³ This means that a person's right to life must be preserved unless its deprivation is absolutely necessary due to extreme situations: for instance, sometimes lethal force may have to be used to save innocent lives when no other alternative is available.¹²⁵⁴

The use of force with the consent of the host State does not by itself denote the presence of an armed conflict, meaning that by default, any targeted killings based on such consent take place in the context of normal law enforcement.¹²⁵⁵ As this enacts the human rights regime, no targeted person can be viewed as a combatant and can only be deprived of

¹²⁴⁷ Byrne, 'Consent and the Use of Force', pp. 102-103; Association of the Bar of the City of New York, 'The Legality under International Law of Targeted Killings', pp. 8-9; Olivier Corten, 'The "Unwilling or Unable" Test: Has it Been, and Could it be, Accepted?' (2016) 29 *Leiden Journal of International Law* 777, pp. 778-779.

¹²⁴⁸ Kimberley N. Trapp, 'Can Non-State Actors Mount an Armed Attack?', in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford, Oxford University Press, 2015), pp. 679-680 and 694-695.

¹²⁴⁹ Association of the Bar of the City of New York, 'The Legality under International Law of Targeted Killings', p. 8.

¹²⁵⁰ Trapp, 'Can Non-State Actors Mount an Armed Attack?', pp. 680 and 695-696.

¹²⁵¹ Melzer, Targeted Killing in International Law, pp. 3-4.

¹²⁵² David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16 *The European Journal of International Law* 171, p. 190; Melzer, Targeted Killing in International Law, p. 56.

¹²⁵³ Melzer, Targeted Killing in International Law, p. 58.

¹²⁵⁴ The International Covenant on Civil and Political Rights (16 December 1966, in force 23 March 1976), 999 UNTS 171, Article 6(1); Kretzmer, 'Targeted Killing of Suspected Terrorists', p. 179.

¹²⁵⁵ Kretzmer, 'Targeted Killing of Suspected Terrorists', p. 176.

their life as the last resort.¹²⁵⁶ Given that targeted killings are executed with the specific goal of terminating suspected terrorists, one can conclude that this intent does not satisfy the legal requirements set forth by the human rights regime.¹²⁵⁷

Thus, it remains apparent that intervention by invitation alone cannot act as a basis for the practice of targeted killings, as the regime of law enforcement simply does not allow such activities.¹²⁵⁸ Instead, the intervention by invitation must rely on other concepts for support, preferably notions which may bring about the presence of an armed conflict. Thus far, support has been sought from self-defence and non-international armed conflicts. Of these candidates, perhaps more prevalent has been self-defence in response to an armed attack.¹²⁵⁹ This scenario is in part due to the argument structures on targeted killings in general: as noted above, the United States in particular has justified its targeted attacks on self-defence.¹²⁶⁰ It should be noted that arguing self-defence alongside intervention by invitation may result in a certain mixture. If the two concepts were to be applied side by side, the host State consent would likely be eclipsed by the concept of self-defence, technically making it a matter of collective self-defence.¹²⁶¹ As a result, self-defence has often appeared as the primary, if not sole, legal justification to targeted killings.¹²⁶²

However, combining self-defence and intervention by invitation to justify targeted killings does not seem sustainable at the moment, as self-defence as a legal justification for targeted killings is unstable at best.¹²⁶³ When examining current practice on the matter, it would appear that by the standards of international law, there are insufficient elements for a claim of self-defence, which then leaves host State consent as the only proper justification.¹²⁶⁴ For instance, one can easily argue that continuous targeted killings do not actually respond to an ongoing armed attack, at least not in a manner which spells out immediacy.¹²⁶⁵ Naturally, one could claim that self-defence can now be invoked in the

¹²⁵⁶ Melzer, *Targeted Killing in International Law*, p. 58-59.

¹²⁵⁷ *Ibid.*, pp. 58-60.

¹²⁵⁸ *Ibid.*

¹²⁵⁹ Trapp, 'Can Non-State Actors Mount an Armed Attack?', pp. 679-680.

¹²⁶⁰ Martin, 'Going Medieval', pp. 225-226; Shekell, 'The Legality of the United States' Use of Targeted Killings', pp. 315-320.

¹²⁶¹ Brownlie, *International Law and the Use of Force*, p. 327; Kreb, 'The Fine Line Between Collective Self-Defense and Intervention by Invitation', *Just Security*, 17 February 2015.

¹²⁶² Martin, 'Going Medieval', pp. 225-226; Byrne, 'Consent and the Use of Force', pp. 102-103.

¹²⁶³ Leo Katz, 'Targeted Killing and the Strategic Use of Self-Defence', in Claire Finkelstein, Jens David Ohlin and Andrew Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford, Oxford University Press, 2012), p. 467.

¹²⁶⁴ Trapp, 'Can Non-State Actors Mount an Armed Attack?', p. 695; Byrne, 'Consent and the Use of Force', pp. 102-103.

¹²⁶⁵ Shekell, 'The Legality of the United States' Use of Targeted Killings', p. 316.

face of an impending attack, but such claims have not gained wide support in the international community.¹²⁶⁶ Thus, the idea of applying self-defence in conjunction with intervention by invitation, while plausible in the legal sense, has resulted in impasses in practice.

Of course, given the prominent practice on external interventions and non-international armed conflicts, one might question if the presence of a civil war could justify the use of targeted killings. After all, a civil war is undeniably an armed conflict during which lethal force can be expected to be deployed when necessary.¹²⁶⁷ Still, there is considerable dissent over whether the distinction of a combatant is applicable in non-international armed conflicts, which — while not definitely prohibiting it — can heavily affect the limits of available lethal force.¹²⁶⁸ However, the claims that combatants do not exist in non-international armed conflicts have been subject to criticism, since reaching such a conclusion would denote that even terrorists directly engaging in a civil war should be regarded as civilians.¹²⁶⁹ Such an argument is clearly unsustainable, particularly since many international terrorist organisations are factions in various current civil wars.¹²⁷⁰

In any event, if intervention by invitation is now considered applicable in certain non-international armed conflicts,¹²⁷¹ perhaps targeted killings with the territorial State's consent could be allowable. In fact, this could be the most conceivable method of basing targeted killings on the territorial State's consent. In such a case the legality of the use of force would be covered towards both the host State and the target, effectively solving the matter. This is theoretically possible, especially given the fine line¹²⁷² between different types of armed conflict.

Still, it would be ill-advised to draw far-reaching conclusions based on the above statement. As it will be demonstrated later, the matter of applying invited interventions in civil wars still entails multiple issues, and such conundrums would also carry over to targeted killings.¹²⁷³ The problems range from the practical issues of identifying the legitimate representative to the matter of upholding the duty of non-intervention.¹²⁷⁴ Moreover, a bigger, more general legal question concerning the entire notion of a non-

¹²⁶⁶ Ibid., pp. 316-317.

¹²⁶⁷ Melzer, *Targeted Killing in International Law*, pp. 55-57.

¹²⁶⁸ Colonel Mark Maxwell, 'Rebutting the Civilian Presumption: Playing Whack-a-Mole Without a Mallet?', in Claire Finkelstein, Jens David Ohlin and Andrew Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford, Oxford University Press, 2012), pp. 40-41.

¹²⁶⁹ Ibid., p. 59.

¹²⁷⁰ Ibid.

¹²⁷¹ This notion is more thoroughly discussed in Section 3.1. of this chapter.

¹²⁷² Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 864.

¹²⁷³ See Section 3.1. of this chapter.

¹²⁷⁴ See Chapter IV, Section 3.2.

international armed conflict may present itself.¹²⁷⁵ As matters currently stand, applying intervention by invitation in a civil war is immediately connected to the increasingly difficult distinction between international and non-international matters demanding military attention.¹²⁷⁶ If this continues to be the case, a non-international conflict could not truly be considered such, resulting in possibly dangerous combinations of ingredients.

To finish this section, one final observation should be made about invited interventions and targeted killings: the political context in which such operations often take place. While many targeted killings have occurred on the soil of third countries, they have also most prominently served the purposes of the intervenor, often the United States.¹²⁷⁷ Such was undoubtedly the case when the country staged a brief military intervention in Pakistan in 2011 that resulted in the death of terrorist leader Osama bin Laden.¹²⁷⁸ This is questionable from the legal perspective of invited interventions, as the core legitimacy of the doctrine should be the sovereign will of the territorial State:¹²⁷⁹ in these cases, the ultimately determining factor has been the agenda of the intervening State instead.¹²⁸⁰

Given this glaring political agenda and subsequent distortion in terms of power, it has sometimes been difficult to decipher if the host State has given its genuine consent to the intervention. The situation with invited interventions and Pakistan manifests this dilemma very well. The country has often indicated its disapproval of the military operations undertaken on its territory, countering the claims of certain other sources which have maintained that the State has in fact consented to such measures.¹²⁸¹ In addition, the possibility of other territorial States giving consent under duress cannot be forgotten, either.¹²⁸² After all, if a superpower State approaches a smaller one with a proposition concerning targeted killings on the latter's territory, one might find it difficult to imagine that the States in question hold equal negotiating positions.

Moreover, such examples show that targeted killings are a unilateral way of tackling terrorism, not a collective take.¹²⁸³ Since the current use of targeted killings has chiefly

¹²⁷⁵ Stephen C. Neff, *War and the Law of Nations: A General History* (New York, Cambridge University Press, 2005), p. 359.

¹²⁷⁶ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', pp. 864 and 866-867; Henderson, 'Editorial Comment', p. 210.

¹²⁷⁷ Byrne, 'Consent and the Use of Force', pp. 102-103.

¹²⁷⁸ Luis E. Chiesa and Alexander K.A. Greenawalt, 'Beyond War: Bin Laden, Escobar, and the Justification of Targeted Killing' (2012) 69 *Washington and Lee Law Review* 1371, pp. 1373-1374; Macon Phillips, 'Osama Bin Laden Dead', The White House, 2 May 2011, <www.obamawhitehouse.archives.gov/blog/2011/05/02/osama-bin-laden-dead>.

¹²⁷⁹ *International Law Commission's Draft Articles on State Responsibility*, Article 20; Crawford, Brownlie's Principles, p. 769.

¹²⁸⁰ Byrne, 'Consent and the Use of Force', pp. 102-103 and 124-125.

¹²⁸¹ *Ibid.*, pp. 119 and 124-125; Shekell, 'The Legality of the United States' Use of Targeted Killings', p. 324.

¹²⁸² Byrne, 'Consent and the Use of Force', pp. 106-107.

¹²⁸³ *Ibid.*, pp. 102-103.

arisen from individual self-defence, this statement is hardly surprising. However, this reality not only makes targeted killings controversial, but also shows that they ultimately fail to solve the matter of terrorism effectively. The threats caused by international terrorist organisations cannot be properly responded to without international cooperation, preferably at a forum which gathers more members of the global community than the often bilaterally agreed targeted killings. This fact has been recognised by States as well, which has led them to seek a sturdier collective stance on the matter.

2.2.3. The Second Wave: Invited Interventions Pursuant to ISIS in Iraq and Syria after 2011

The global fight against terrorism is a matter which combines elements from many international legal concepts, including but not limited to self-defence, intervention by invitation and collective security. However, the first modern cases of invited interventions in response to terrorism have lacked the element of collectivity, as so amply shown by the targeted killings discussed above. This is hardly desirable. Although international terrorism affects the whole global community, the actions pursued post-9/11 have tended to polarise rather than unite nations. For instance, the aforementioned ‘War on Terror’ has in retrospect been regarded predominantly negatively, despite the initial sympathy and unity in the face of the attacks by al-Qaida.¹²⁸⁴ Of course, it is in such circumstances that invited interventions thrive, which in part explains its appearances in this context. Still, whenever collective actions are politically plausible, the preferred forum for authorising military operations should be the Security Council.¹²⁸⁵

However, the element of collectivity does not immediately rule out intervention by invitation as a lawful measure, either. As established earlier in this dissertation,¹²⁸⁶ given the partial dissolution of the initially planned system for collective use of force, the simultaneous application of invited interventions and armed measures under Chapter VII is possible within both legal and practical frameworks. After all, the application of collective use of force is factually under the command chain of the individual States that choose to take part in the operation authorised by the Security Council.¹²⁸⁷

Of course, the option of using collective measures in conjunction with unilateral ones has not meant that the possibility has been realised in practice. In fact, with the exception of the current military intervention in Mali, the Security Council has proved itself considerably futile in the face of terrorism of either an international or a national nature.

¹²⁸⁴ Boyle, ‘Making Sense of Self-Defence’, pp. 55-56.

¹²⁸⁵ UN Charter, Preamble and Articles 1(1), 24 and 39.

¹²⁸⁶ This was discussed and established earlier in this section, as well as in Chapter IV, Section 3.3.3.

¹²⁸⁷ Gazzini, *Changing Rules*, pp. 35-36 and 63.

While the organ has steadily been able to adopt Resolutions condemning terror attacks, it has not managed to authorise collective military measures to combat such threats.¹²⁸⁸ This has resulted in individual States resorting to other justifications when arguing in favour of military measures, including the notions of self-defence and host State consent.¹²⁸⁹ In other words, although many States often communicate through the collective forum that is the Security Council, they ultimately tend to argue for the use of unilateral armed measures.

In such argumentation for unilateral measures, self-defence and intervention by invitation have been particularly important. The two concepts have become increasingly entwined, to the point of perhaps becoming a single entity, in combatting international terrorism.¹²⁹⁰ This can in part be attributed to the evolution of self-defence as a legal concept. It has drifted away from strict inter-State conflicts and into a realm where a terrorist organisation may execute an armed attack against a State, at least under certain conditions.¹²⁹¹ As a result, a terrorist organisation such as ISIS could be regarded as making armed attacks against Iraq and Syria, rather than being a faction in their respective civil wars.¹²⁹² And of course, other States may attempt to invoke the claim of their own self-defence as well, given that ISIS has claimed responsibility over several attacks across the world.¹²⁹³ This means that when pursuing terrorist organisations, an intervening State may invoke either its own self-defence or that of the territorial State itself, constituting collective self-defence.¹²⁹⁴ Adding host State consent into this mix establishes quite a concoction, from which it is hard to discern all the individual arguments involved.

In recent years, these arguments have appeared in the policies of States that have intervened upon request in Iraq and Syria to combat the threat of ISIS.¹²⁹⁵ The need for

¹²⁸⁸ Ibid.; *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 2249, para. 5.

¹²⁸⁹ Henderson, 'Editorial Comment', pp. 209-211; Ruys and Verlinden, 'Digest of State Practice 1 July — 31 December 2014', pp. 134-136 and 140-145.

¹²⁹⁰ Kreb, 'The Fine Line Between Collective Self-Defense and Intervention by Invitation', *Just Security*, 17 February 2015.

¹²⁹¹ *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 1368, Preamble.

¹²⁹² Kreb, 'The Fine Line Between Collective Self-Defense and Intervention by Invitation', *Just Security*, 17 February 2015.

¹²⁹³ The Record of the Security Council's 7565th Meeting, 20 November 2015, UN Doc. S/PV/7565, pp. 2, 4 and 9; Ruys and Verlinden, 'Digest of State Practice 1 July — 31 December 2014', pp. 134-135.

¹²⁹⁴ The Record of the Security Council's 7565th Meeting, pp. 2, 4 and 9; Kreb, 'The Fine Line Between Collective Self-Defense and Intervention by Invitation', *Just Security*, 17 February 2015; Henderson, 'Editorial Comment', p. 211.

¹²⁹⁵ Ruys and Verlinden, 'Digest of State Practice 1 July — 31 December 2014', pp. 132-145; Henderson, 'Editorial Comment', pp. 209-211.

such use of force occurred in 2014, when the terrorist organisation gained a footing in both States, a development which continued in the succeeding years.¹²⁹⁶ This wavered the already war-torn Iraq, and plunged the Syrian Civil War further into chaos by injecting an alarming faction into the conflict.¹²⁹⁷ The advance of ISIS aroused the concerns of the international community, which began to ponder the appropriate measures — including military ones — to counter the group and its presence in the Middle East.¹²⁹⁸

Despite these worries, disruption was evident in stances about intervening in Iraq and Syria in 2014.¹²⁹⁹ Of these two, the case of Iraq was deemed to be both legally and politically clearer. While the situation in the country had escalated to that of a civil war, the legal premise of having an internationally recognised government persisted, as did the politically pressing matter of ISIS.¹³⁰⁰ Moreover, the Security Council continued to monitor the situation consistently, bringing forward an additional element of collectivity.¹³⁰¹

Syria's case, however, was significantly more complicated. The factor of ISIS was present there as well, but the chaotic civil war and the global community's long-standing failure to find a solution made military intervention politically less alluring.¹³⁰² Furthermore, various States noted that identifying the sovereign authority of Syria was nearly impossible at the time, leaving intervention by invitation legally out of the question for several potential interveners.¹³⁰³ To top matters off, the Security Council has been infamously futile in the face of the Syrian crisis, which further deepened the rift between States willing to get involved in the matter.¹³⁰⁴

Consequently, this situation initially led to the conflicts of Iraq and Syria being dealt with very differently. The request for military intervention supplied by the Iraqi

¹²⁹⁶ Ruys and Verlinden, 'Digest of State Practice 1 July — 31 December 2014', p. 131; Tim Marshall, *Prisoners of Geography: Ten Maps That Tell You Everything You Need to Know About Global Politics* (London, Elliott and Thompson Limited, 2016), pp. 156-157; Olivia Flasch, 'The Legality of the Air Strikes against ISIL in Syria: New Insights on the Extraterritorial Use of Force against Non-State Actors' (2016) 3 *Journal on the Use of Force and International Law* 37, p. 38.

¹²⁹⁷ Marshall, *Prisoners of Geography*, pp. 156-158.

¹²⁹⁸ Henderson, 'Editorial Comment', p. 209-211.

¹²⁹⁹ Claire Mills, *ISIS/Daesh: the Military Response in Iraq and Syria, Briefing Paper Number 06995, 8 March 2017* (House of Commons Library, 2017), p. 44.

¹³⁰⁰ Henderson, 'Editorial Comment', p. 210; Arabella Lang, *Legal Basis for UK Military Action in Syria, Briefing Paper Number 7404, 1 December 2015* (House of Commons Library, 2015), p. 12; Flasch, 'The Legality of the Air Strikes against ISIL in Syria', pp. 37-38.

¹³⁰¹ *Iraq*, SC Res. 2233, 29 July 2015, UN Doc. S/RES/2233, Preamble.

¹³⁰² Henderson, 'Editorial Comment', p. 212.

¹³⁰³ *Ibid.*, pp. 212-213; Ruys and Verlinden, 'Digest of State Practice 1 July — 31 December 2014', pp. 141-143.

¹³⁰⁴ Record of the Security Council's 6711th Meeting, 4 February 2012, UN Doc. S/PV.6711, pp. 2-9; Record of the Security Council's 6810th Meeting, 19 July 2012, UN Doc. S/PV.6810, p. 2; Fox, 'Intervention by Invitation', pp. 838-839.

government was quickly responded to by a large coalition of States from all over the world.¹³⁰⁵ When similar airstrikes first began in Syria, the number of participants was noticeably smaller and less diverse.¹³⁰⁶ While the United States took part in both interventions, many Western States initially opted out of conducting airstrikes in Syria.¹³⁰⁷ A notable example was the United Kingdom, which in 2014 only took part in the armed intervention in Iraq.¹³⁰⁸ This stance notably changed following the 2015 attacks in Paris, after which the UK not only issued a swift mandate to deploy armed force against ISIS in Syria, but also immediately put that authorisation to use in practice.¹³⁰⁹ Several other States have shown similar initiatives, having expanded their initial interventions into the Syrian soil.¹³¹⁰

The numerous foreign interventions in the current Syrian Civil War have been discussed extensively in this thesis: however, this example must be brought up yet again, this time from the perspective of combating international terrorism from various frontiers. As established earlier, the opinions within the international community have been starkly contrasting as far as intervening in the Syrian conflict goes. This has effectively paralysed the Security Council and left any chance of authorising collective use of force in Syria to the brink of impossible.¹³¹¹ Although most States initially refrained from intervening directly, indirect support was allegedly delivered by both Russia and the United States to al-Assad's regime and the moderate rebels respectively.¹³¹² By 2014 and 2015, these indirect actions had led to fully-fledged military interventions, with some Western States supporting certain factions of the rebels, whereas Russia staged airstrikes at the request of al-Assad.¹³¹³ This means that in the absence of collective measures, States have taken to individual activities instead, resulting in them supporting opposing sides in a military conflict.

¹³⁰⁵ Ruys and Verlinden, 'Digest of State Practice 1 July — 31 December 2014', pp. 136-137.

¹³⁰⁶ Ibid., pp. 141-143; Henderson, 'Editorial Comment', p. 212.

¹³⁰⁷ Henderson, 'Editorial Comment', pp. 211-212.

¹³⁰⁸ Ibid., p. 212; Mills, ISIS/Daesh: the Military Response in Iraq and Syria, p. 44.

¹³⁰⁹ Mills, ISIS/Daesh: the Military Response in Iraq and Syria, p. 44; Frances Perraudin, Haroon Siddique and Michael Safi, 'Syria Airstrikes: Britain Launches "Offensive Operation" after Vote to Bomb Isis Targets — as It Happened', *The Guardian*, 3 December 2015, <www.theguardian.com/world/live/2015/dec/03/syria-airstrikes-britain-launches-bombing-against-isis-targets-rolling-report>.

¹³¹⁰ Mills, ISIS/Daesh: the Military Response in Iraq and Syria, pp. 27-28; Ruys, Ferro and Verlinden, 'Digest of State Practice 1 July — 31 December 2015', pp. 279-282.

¹³¹¹ Anders Henriksen and Marc Shack, 'The Crisis in Syria and Humanitarian Intervention' (2014) 1 *Journal on the Use of Force and International Law* 122, pp. 122-123 and 147.

¹³¹² Lister, 'Russia's Syria Expedition: Why Now and What's Next?', *CNN News*, 1 October 2015.

¹³¹³ Ibid.; Christina Nowak, 'The Changing Law of Non-Intervention in Civil Wars — Assessing the Production of Legality in State Practice After 2011' (2018) *Journal on the Use of Force and International Law*, DOI: 10.1080/20531702.2018.1431457, pp. 11-12.

Initially, this scattered support to the factions of the civil war exemplified the dissent over Syria's internal situation.¹³¹⁴ However, the appearance and increased status of ISIS has shifted the political focus on the looming threat of international terrorism. For instance, when justifying his country's military intervention in Syria, President Putin emphasised not only the legal premise of host State consent, but also the importance of tackling ISIS and hindering its process.¹³¹⁵ Still, this does not erase the fact that having various international frontiers in an already fragmented civil war is unlikely to resolve the issue — at worst, it can further internationalise the conflict.

However, following the Paris attacks in November 2015, efforts for more collective action, with or without Security Council authorisation, have gained momentum.¹³¹⁶ Thus, it appears that even if a uniform coalition cannot be achieved, the intervening States have been more willing to cooperate to avoid possible collisions in the battlefield.¹³¹⁷ This may open the door for collective security in the future: nevertheless, given how difficult the road has been so far, fool-proof predictions cannot be made. For the time being, the concepts of self-defence and intervention by invitation, in one form or another, have played a bigger part against terrorism, at least when it comes to actual practice and definite legal argumentation. This has allowed the participating States to maintain their individual political positions, which may be antagonistic and accusing in nature, but still work quietly towards a common goal.¹³¹⁸

In the purely legal sense, this scenario is definitely sketchy but within the realms of the possible. As noted earlier, intervention by invitation and self-defence share much more common ground than is immediately visible. This common ground has been seen in the current cases of Iraq and Syria, and it is by no means surprising. After all, this correlation extends to matters concerning international terrorism as well, since the concept of self-defence was arguably modified to include responses to terror acts following the 9/11 attacks in 2001, at least when such attacks can be sufficiently linked to a sovereign State.¹³¹⁹ Consequently, although by no means optimal, one can understand

¹³¹⁴ Ruys and Verlinden, 'Digest of State Practice 1 July — 31 December 2014', pp. 141-144.

¹³¹⁵ Lister, 'Russia's Syria Expedition: Why Now and What's Next?', *CNN News*, 1 October 2015.

¹³¹⁶ *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 2249, Preamble and para. 5.

¹³¹⁷ Tim Hume and Don Melvin, 'Pressure on ISIS Builds: France, Russia Consult; Britain Calls for Airstrikes', *CNN News*, 27 November 2015, <edition.cnn.com/2015/11/26/world/paris-attacks>.

¹³¹⁸ For instance, the United States and Russia have blamed each other for escalating the crisis in Syria, but have still acknowledged that the threat of ISIS must be attended to. See Record of the Security Council's 7744th Meeting, 25 July 2016, UN Doc. S/PV.7744, pp. 12-15; Record of the Security Council's 7757th Meeting, 22 August 2016, UN Doc. S/PV.7757, pp. 14 and 16-17.

¹³¹⁹ *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 1368, Preamble; Gazzini, *Changing Rules*, pp. 184-187.

why this combination has thus far been chosen by the proactive States. For these reasons, although international terrorism is indeed a threat which requires global cooperation, collective measures have been forced to take a backseat, while unilateral ones are enacted instead.

Thus, rather than enabling collective action, the Security Council has acted as a political umbrella under which States convene to discuss the appropriate unilateral measures against terrorist organisations.¹³²⁰ The current fight against ISIS is an example: while the matter is continuously debated in the Council, the organ has stopped short of authorising military measures against the terrorist group.¹³²¹ Instead, the Resolutions of the Council have provided several States mutual points of interest, such as humanitarian matters and afflictions on UN personnel, which consequently have been pursued when these States have taken to staging different external measures in other territories such as Syria.¹³²²

Of course, this mixture of tentative collective understanding and unilateral measures does not remove the issues of external interventions. For instance, while ISIS is undeniably an international terrorist organisation, non-international armed conflicts are still present in both Iraq and Syria. In other words, both States are amid respective internal crises.¹³²³ External interventions can thus result in violating the duty of non-intervention, as foreign activities may influence the outcome of the territorial State's upheaval. Any foreign armed intervention must thus be executed with great care and deliberate goals — such as combatting terrorism — in mind, so that the political independence of the territorial State is preserved.¹³²⁴ However, since this form of external intervention is a new development, no definite limits mulled over the years have yet been established.

Moreover, although the current union between self-defence and intervention by invitation appears to be the preferable at the moment, only time will show its longevity.

¹³²⁰ *Inter alia* the Record of the Security Council's 7565th Meeting, pp. 2-9; Record of the Security Council's 7587th Meeting, 17 December 2015, UN Doc. S/PV.7587, pp. 2-3, 5-7, 8-9 and 23-24.

¹³²¹ *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 2249, para. 5; Ruys and Verlinden, 'Digest of State Practice 1 July — 31 December 2014', p. 145.

¹³²² *Humanitarian Aid Access to Syria*, SC Res. 2139, 22 February 2014, UN Doc. S/RES/2139, Preamble; *Middle East*, SC Res. 2165, 14 July 2014, UN Doc. S/RES/2165, Preamble; *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 2249, Preamble and para. 5; *The Situation in the Middle East*, SC Res. 2393, 19 December 2017, UN Doc. S/RES/2393, Preamble and paras. 1-4; *The Situation in the Middle East*, SC Res. 2394, 21 December 2017, UN Doc. S/RES/2394, Preamble and paras. 3-5; Ruys and Verlinden, 'Digest of State Practice 1 July — 31 December 2014', p. 145.

¹³²³ Henderson, 'Editorial Comment', pp. 209-210.

¹³²⁴ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 864; UN Charter, Article 2(4); *Friendly Relations*, Principles I and III; Record of the Security Council's 8058th Meeting, 27 September 2017, UN Doc. S/PV.8058, pp. 3, 8 and 10.

After all, while it does the best it can to form a sense of global unity in the absence of collective security, the union can only provide first aid when combatting international terrorism. Collective security remains the starting point when it comes to international peace and security, which international terrorist organisation irrevocably threaten.¹³²⁵ This means that other military alternatives act as the *de facto* replacements of collective security. Hence, eventually the role of collective security will have to be cemented, and this development will influence the positions of both self-defence and intervention by invitation.

2.2.4. Applying Intervention by Invitation to Combat Terrorism: Common Goals or Sovereign Interests?

The international fight against terrorism is currently a changing field of international law, wherein new means to combat the threats of fundamentalist groups arise on regular basis. Intervention by invitation has appeared as one of these measures in certain contexts.¹³²⁶ Hence, the consent of the host State has become prominent when it comes to both targeting individual terrorists and terror groups. In the end, this is not very surprising. International terrorism is a field in which the cooperation of States is not just possible but also crucial, making intervention by invitation pertinent. Nevertheless, intervention by invitation by itself cannot answer to the threat caused by international terrorism, resulting in other concepts being deployed as well.

However, deciphering the exact legal norms States invoke to use armed force is not easy, especially when they pursue groups such as ISIS and al-Qaida. As shown by the War on Terror, arguments may range from self-defence to even implicit Security Council authorisation.¹³²⁷ The dilemma has further appeared in the on-going pursue of ISIS. While tentative consensus on the importance of eliminating ISIS has been reached, the actual legal positions taken by different States are still mixed. Furthermore, the context of civil wars may amount to further problems. The confusing set of arguments often applies to targeted killings and other unilateral armed activities as well, which often tend to be first and foremost linked with the self-defence doctrine — at least in public discussion.¹³²⁸

Finally, the issue of genuine consent may be present in invited interventions tackling terrorism. The imbalance of power is at its heaviest in such operations, as the host States

¹³²⁵ UN Charter, Articles 1(1) and 39; *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 1368, Preamble; *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 2249, Preamble.

¹³²⁶ Henderson, 'Editorial Comment', pp. 209-210.

¹³²⁷ Ibid., p. 209-211; Gazzini, *Changing Rules*, pp. 77-79; Shekell, 'The Legality of the United States' Use of Targeted Killings', pp. 315-317.

¹³²⁸ Shekell, 'The Legality of the United States' Use of Targeted Killings', pp. 315-320.

tend to be countries in crisis, whereas the intervenors wield influence.¹³²⁹ In other words, such interventions are often executed pursuant to goals of the intervening States, particularly where targeted killings are concerned.¹³³⁰ Furthermore, when other States intervene to combat terrorism in the context of civil wars, the extraction of proper host State consent may be an impossible task, due to the lack of a clear legitimate representative in the country.¹³³¹ This leaves any host State in a vulnerable position, causing one to wonder if it actually consented to the use of force on its territory. Such issues must be addressed if the international community continues to invoke invited interventions in the fight against terrorism.

2.3. Invited Interventions and the Tentative Truce Between Unilateral and Collective Armed Activities

Since the end of the Cold War, the international community has faced upheavals which have been sudden yet ultimately traceable. Intervention by invitation's appearance during this fits the doctrine's earlier position in the international community. Throughout the UN era, the concept has appeared like a piece of bandage. Its main function has been to contain the wounds sustained by the Charter's system on the use of force, particularly the inability to implement collective security fully.

Thus, the doctrine has unsurprisingly played its part in the current ensemble cast which attempts to cope with the themes present in international relations. However, the members of said cast have not succeeded in finding definite roles for themselves. Instead, the concepts currently at the forefront appear to have become entangled. Examples of this entwinement include the on-going cases in Iraq, Mali and Syria. All incidents showcase how intervention by invitation is becoming notably aligned with both collective security and self-defence, particularly in the face of international terrorism. However, no matter how one views the current outcome, it cannot conceivably be asserted that a true and lasting symbiosis between collective and unilateral armed measures has been discovered. Rather, an intermediate balance has been established, and it bears the threat of being interrupted at any moment.

Regarding this particular balance, much emphasis has been placed on the evolution of collective security. While collective use of force has now emerged from its prolonged hibernation, it is still struggling within the international community. Once its footing is established, the purported alignment of unilateral and collective armed activities will inevitably change. The status of intervention by invitation, situated in the middle of

¹³²⁹ Blum and Heymann, 'Law and Policy of Targeted Killing', pp. 150-151 and 166.

¹³³⁰ Ibid.

¹³³¹ Henderson, 'Editorial Comment', pp. 212-213.

current arguments, would be affected as well. Thus, for now one can assert that the tentative union of unilateral and collective measures remains at a shaky level. This means that intervention by invitation has been unable to act as a permanent and infallible cure to the breakdowns within the Charter's system. Rather, it continues dutifully to serve its earlier position as a form of first-aid, one which may currently be tasked with goals well beyond its capacities.

3. Internationalising the Internal: Consent, Use of Force, and Formerly Non-International Armed Conflicts

3.1. Non-International Armed Conflicts: No Longer a Solely Internal Matter?

3.1.1. The Current Practice of Globalising Internal Conflicts

After examining intervention by invitation in the context of collective matters, we should turn our attention to the doctrine and its connection to non-international armed conflicts. As noted above, intervention by invitation is currently playing a part in aligning unilateral and collective military measures. This venture has not been without flaw, and intervention by invitation has faced issues within traditionally internal contexts as well. The doctrine is currently facing changes in reference to non-international armed conflicts and secessionist conflicts, in which its applicability has been questioned.

However, such settings are not wholly unnatural for invited interventions. Indeed, as noted various times throughout this thesis, internal crises have been the birthplace of the concept.¹³³² Nevertheless, by the UN era, whenever such crises crossed the threshold of a civil war, intervention by invitation became inapplicable on paper.¹³³³ Still, as extensively discussed in Chapter IV of this dissertation, this premise has been heavily challenged since the conclusion of the Cold War, and certain developments have undeniably taken place as a result.¹³³⁴

Given the practice concerning non-international armed conflicts, it appears that such situations can at times include international elements,¹³³⁵ which in turn enable the opportunity for external interventions.¹³³⁶ This means that civil wars are no longer automatically at the sole discretion of the territorial State, as other States or international organisations may also hold valid interests in them.¹³³⁷ Consequently, the circumstance of civil wars does not conclusively rule out the use of force, including invited interventions.¹³³⁸ However, this finding does not suggest that armed interventions are

¹³³² See Chapter IV, Section 3.1.

¹³³³ *Friendly Relations*, Principle III; *Rights and Duties*, Articles 3-4; *Inadmissibility of Intervention*, paras. 1-2.

¹³³⁴ Akande and Vermeer, 'The Airstrikes against Islamic State in Iraq', *EJIL: Talk!*, 2 February 2015.

¹³³⁵ Record of the Security Council's 8144th Meeting, 20 December 2017, UN Doc. S/PV.8144, p. 2.

¹³³⁶ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 864.

¹³³⁷ Franck, *Recourse to Force*, pp. 40-42; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 864.

¹³³⁸ Franck, *Recourse to Force*, pp. 40-42; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 864; Akande and Vermeer, 'The Airstrikes against Islamic State in Iraq', *EJIL: Talk!*, 2 February 2015.

always legally available in all non-international armed conflicts.¹³³⁹ What then remains unclear is the exact effect of these changes: have they succeeded in crafting permanent modifications to the applicability of intervention by invitation in non-international armed conflicts? If so, to what extent?

After all, modifying the international legal norms on the use of force and non-intervention does not occur easily.¹³⁴⁰ Thus, while invited interventions and civil wars are experiencing a watershed moment, turning that watershed moment into long-lasting legal regulation is not a given. Without concrete evidence proving otherwise, the current practice on invited interventions in civil wars may be confined to our time and its crises alone. For this reason, we should dig deeper into the findings the thesis has made on non-international armed conflicts, and how invited interventions may be applicable to them in the future. If the components of persistency, longevity and prevalence can be detected, the emergence of new international law would be at hand as well.

3.1.2. Applying Invited Interventions in Non-International Armed Conflicts: The Major Problems

As noted throughout this thesis, the current practice on intervention by invitation and civil wars suggests that the duty of non-intervention has been evolving over the past few decades. This evolution has tentatively asserted that invited interventions may be applied in certain non-international armed conflicts, as long as said conflicts entail international flourishes as well, such as the presence of globally active terrorist groups.¹³⁴¹ It can be further observed that if a conflict entails international factors, it cannot actually be identified as fully non-international to begin with. Thus, if an invited intervention is staged in order resolve such international issues, while leaving the internal matters of the host State well alone, the practice can be in accordance with international law.¹³⁴²

Nevertheless, even if one determines that intervention by invitation may sometimes be applicable during civil wars, such a finding does not wholly relieve the legal problems. In fact, several issues persist, one of them being the identification of the legitimate representative of the territorial State. As extensively discussed earlier, intervention by invitation is only allowable when the host State's legitimate government consents to it.¹³⁴³ Deciphering such a representative still begins with the effective control test;¹³⁴⁴ however,

¹³³⁹ Van Steenberghe, 'The Alleged Prohibition on Intervening in Civil Wars Is Still Alive', *EJIL: Talk!*, 12 February 2015.

¹³⁴⁰ *Nicaragua*, paras. 206-207.

¹³⁴¹ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 864.

¹³⁴² *Ibid.*

¹³⁴³ *Nicaragua*, para. 246.

¹³⁴⁴ de Wet, 'Modern Practice of Intervention by Invitation', p. 983.

the qualification of democratic legitimacy has made some headway in interventions entailing collective elements.¹³⁴⁵ In any event, putting these two tests into practice has been difficult enough under circumstances short of a civil war, which means that the presence of such a conflict may cause a complete impasse.

Indeed, if a crisis in any State has crossed the threshold of a non-international armed conflict, deciphering the legitimate government may prove impossible due for a range of reasons. A civil war denotes a significant loss of control on the government's part, as well as an utter breakdown of democracy within the territorial State.¹³⁴⁶ This may result in both the effective control and democratic legitimacy qualifications becoming practically redundant. Consequently, if the legitimate representative of the host State cannot be identified, intervention by invitation remains inapplicable as well.¹³⁴⁷ In the end, States are but abstract beings which cannot by themselves issue consent, let alone to a matter as grave as an armed intervention.¹³⁴⁸ In other words, sovereign States always require a human representative to speak on their behalf.¹³⁴⁹

Of course, this conundrum may not be present in all non-international armed conflicts. As practice has shown us, civil wars come in many shapes and sizes, making their legal evaluation a case-by-case matter. An illustrative example is the contrast between the current non-international armed conflicts in Syria and Ukraine. While both States are undeniably undergoing civil wars, these conflicts differ from each other considerably. The conflict in Syria has arguably engulfed the State as an entity, whereas the civil war within Ukraine has been confined to certain parts of Ukrainian territory.¹³⁵⁰ Consequently, the government of Ukraine has faced much less speculation over its effectiveness and capacities, a situation which is heavily contrasted by the current international scuffle over the legitimate representative of Syria.¹³⁵¹

¹³⁴⁵ Fox, 'Intervention by Invitation', pp. 834-837.

¹³⁴⁶ Henderson, 'Editorial Comment', pp. 210 and 212-213; de Wet, 'Modern Practice of Intervention by Invitation', pp. 992-993; Fox, 'Intervention by Invitation', p. 817; Wippman, 'Treaty-Based Intervention', p. 626.

¹³⁴⁷ de Wet, 'Modern Practice of Intervention by Invitation', pp. 992-993.

¹³⁴⁸ Fox, 'Intervention by Invitation', p. 818; Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation', p. 190.

¹³⁴⁹ Fox, 'Intervention by Invitation', p. 818; Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation', p. 190; *German Settlers In Poland*, Advisory Opinion, Series B, No. 6 (1923), p. 22.

¹³⁵⁰ BBC, 'Syria crisis: Where key countries stand', *BBC News*, 30 October 2015; BBC, 'Ukraine profile - Overview', *BBC News*, 13 January 2016, <www.bbc.com/news/world-europe-18006246>.

¹³⁵¹ Henderson, 'Editorial Comment', pp. 212-213; BBC, 'Ukraine profile - Overview', *BBC News*, 13 January 2016; Visser, 'Russia's Intervention', *EJIL: Talk!*, 25 November 2015; Ruys and Verlinden, 'Digest of State Practice 1 July — 31 December 2014', pp. 141-143.

In addition to the issues over the legitimate representative, applying invited interventions in non-international armed conflicts contains problems relating to the duty of non-intervention. This obligation still stands in today's international law, and thus places several limitations on the applicability of intervention by invitation in civil wars.¹³⁵² Most of them concern ensuring that third States do not intrude in another's internal matters, a risk which is always realisable during armed interventions.¹³⁵³ Thus, although the newly internationalised nature of civil wars may open opportunities for external interventions, the possible effects on the purely internal matters of the host State have not vanished. For example, if a third State intervenes in another's civil war to combat terrorism, its intervention may also change the power relations between the war's factions. To state it differently, while the external intervention may have been staged due to the international elements of the civil war, it can affect the conflict's internal aspects as well.¹³⁵⁴

Therefore, third States intervening in another's civil war should only do so in a limited manner. Any intervention must be executed with great care and well-defined goals, such as combatting terrorist organisations, as only through such efforts can the operation's influence be as limited as possible.¹³⁵⁵ Of course, this is easier said than done. Armed interventions by nature have the tendency to unravel in unexpected manners, which means that it is impossible to plan them perfectly beforehand. In its essence, this sentiment brings us back to the core reason for banning armed force by States: the use of force remains unpredictable, as even the simplest of measures can lead to full-scale global wars.¹³⁵⁶ Intervention by invitation is no stranger to such escalation, as evidenced by the doctrine's deployment in the early stages of the Second World War, and its subsequent effect on the War itself.¹³⁵⁷ Such fears can still be realised when applying invited interventions, especially since civil wars now often bear international elements.

How States should draw the lines on intervening upon request in a civil war is a multifaceted question, and the answers are privy to the individual interventions themselves. Of course, from the perspective of an international lawyer, the most desirable route would be to rely on the Security Council and its possible authorisations on the matter. After all, collective security should still be the centrepiece of the regulation under

¹³⁵² Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', pp. 862-864.

¹³⁵³ *Ibid.*; *Inadmissibility of Intervention*, Preamble and paras. 1-2.

¹³⁵⁴ This was the case with the Libyan collective intervention in 2011, which effectively resulted in a regime change in the target country, see *Report of the Credentials Committee*, para. 4 and *Credentials of Representatives to the Sixty-sixth Session of the General Assembly*.

¹³⁵⁵ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 864.

¹³⁵⁶ UN Charter, Preamble.

¹³⁵⁷ Brownlie, *International Law and the Use of Force*, p. 317.

the Charter, even if intervention by invitation has been allowed to frolic about.¹³⁵⁸ Furthermore, as in the case of Mali, intervention by invitation and collective security can work alongside one another, with invited intervention being used as a supporting act in the midst of collective measures.¹³⁵⁹ In other words, the goals set forth by a Security Council authorisation to deploy collective force can also be used to limit the scope of an invited intervention as well. However, as Security Council action cannot be taken for granted, this route also remains most improbable.

In this likely absence of Security Council activity, intervening States will have to enact individual assessments on preserving the duty of non-intervention. This will inevitably lead to erratic results, as States tend to have such contrasting opinions when it comes to armed interventions of all sorts. Naturally, since the principle of non-intervention is a norm of customary international law, its evolution remains in constant rotation anyway.¹³⁶⁰ Thus, in accordance with the apparent flimsiness of the duty of non-intervention, the application of invited interventions during civil wars is slated for a bumpy ride for the near future. Still, all hope should not be cast aside. After all, even in *Nicaragua* the ICJ found that while select States may test its limits, the duty of non-intervention does not automatically yield to these demands.¹³⁶¹ Instead, the norm aims to uphold the general consensus of the international community as a whole,¹³⁶² thus working towards the same global values that have necessitated the resurgence of intervention by invitation.

3.1.3. Non-International Armed Conflicts and Foreign Interventions: Finding the Way Forward

Upon examining contemporary State practice, it appears that intervention by invitation in the context of a non-international armed conflict has become more accepted, or at least tolerated, in the recent decades.¹³⁶³ However, for now this acceptance seems to be limited to situations in which a civil war entails an international aspect, such as a threat of

¹³⁵⁸ UN Charter, Articles 1(1), 24, 39 and 41-42.

¹³⁵⁹ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 868.

¹³⁶⁰ *Nicaragua*, para. 206.

¹³⁶¹ *Ibid.*, para. 207.

¹³⁶² *Ibid.*

¹³⁶³ *Mali*, SC Res. 2100, Preamble; Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General; Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council; Mills, *ISIS/Daesh: the Military Response in Iraq and Syria*, p. 27-28; de Wet, 'Modern Practice of Intervention by Invitation', pp. 992-994 and 996-997; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 864.

international terrorism or the involvement of the Security Council.¹³⁶⁴ Hence, it is currently best to state that the increasing appearances of invited interventions in civil wars is at least partly connected to the thinning line between different conflicts, which makes the identification of a purely non-international armed conflict more difficult.¹³⁶⁵ This would also indicate that the practice is not due to the complete dissolution of the duty of non-intervention, even if its limits are being tested.¹³⁶⁶

Still, even in this limited context several issues persist, the most important of them relating to evaluating the representative of the host State. Since the effective control test still stands as the primary mean of evaluation, the presence of a non-international armed conflict may cause a stalemate. A civil war in itself signifies a loss of territorial control and the presence of two or more warring factions, which means that one may find it impossible to fulfil the requirement of effective control.¹³⁶⁷ However, this is not necessarily the case in all civil wars, as some such conflicts may be limited to certain parts of the host State. The on-going Ukrainian civil war, in which fighting has mostly been restricted to the Eastern portions of the country, is an example of this.¹³⁶⁸

Nevertheless, putting invited intervention into use in civil wars — at least as the standalone legal element — may still be pushing the doctrine too far. After all, intervention by invitation remains a form of armed force which does not function effortlessly with the system of the Charter.¹³⁶⁹ Given that invited interventions already have sketchy lines in practice, applying them during a civil war might be too much for the doctrine to withstand. Indeed, this is where the tender position of intervention by invitation might not be able to attend to the various issues concerning foreign armed force during a civil war. Instead, attention may have to be turned to the Security Council and collective security, which has access to a wider variety of legal measures.

Security Council action is not a fool-proof solution, though. Time after time, the Council has proven itself to be incapable of properly enacting collective security, reaching a point where such incapacity has become an inherent problem of the organ.¹³⁷⁰ The

¹³⁶⁴ de Wet, 'Modern Practice of Intervention by Invitation', pp. 992-994 and 996-997; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', pp. 864 and 868; Institut de Droit International, Sub-Group C Resolution (10 RES-C EN PLENIERE), Article 2(1).

¹³⁶⁵ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 864; Van Steenberghe, 'The Alleged Prohibition on Intervening in Civil Wars Is Still Alive', *EJIL: Talk!*, 12 February 2015.

¹³⁶⁶ Van Steenberghe, 'The Alleged Prohibition on Intervening in Civil Wars Is Still Alive', *EJIL: Talk!*, 12 February 2015.

¹³⁶⁷ de Wet, 'Modern Practice of Intervention by Invitation', pp. 992-993; Wippman, 'Treaty-Based Intervention', p. 626.

¹³⁶⁸ BBC, 'Ukraine profile - Overview', *BBC News*, 13 January 2016.

¹³⁶⁹ Cassese, *International Law*, pp. 369-370.

¹³⁷⁰ Dag Hammarskjöld Library, 'Security Council — Veto List (in reverse chronological order)'.

problem here is the lack of consensus amongst the Permanent Five: if no agreement is found, collective security remains dormant.¹³⁷¹ This issue exists in the context of civil wars as well, since the Council has often been unable to resolve such conflicts, which leaves the door open for unilateral forms of armed force. This is *inter alia* the case in the Syrian Civil War, which — after a Security Council impasse that has spanned over several years — now involves multiple foreign interventions.¹³⁷² Some of these interventions have allegedly been pursued at the consent of the Syrian representative: the question of who exactly embodies such a representative remains debated.¹³⁷³

As with Syria, invited interventions during civil wars can result in States unilaterally taking up the task of intervening and thus supporting opposing factions of the conflict. This would inevitably lead to several issues. Firstly, one would have to determine which invitation to intervene is legitimate. Secondly, the duty of non-intervention must be preserved as well, a task that is difficult to fulfil under these kinds of circumstances. Thirdly, it can be questioned if a civil war can be resolved through foreign military intervention: in other words, the possible aftermath of the armed activities must be addressed. These issues remain largely unattended to by the current intervention by invitation. Of course, musings on such matters are perhaps of a political rather than legal nature, at least on the surface. However, all law is ultimately political as well, and international law manifests this duality thoroughly. Hence, if the success of intervention by invitation is the aspiration in the context of non-international armed conflicts, the doctrine cannot continue to avoid these issues.

In addition to its own specific issues, applying invited interventions during civil wars has also affected a formerly internal matter of other kind: secessionist conflicts. Civil wars and internal conflicts with secessionist aspirations are bound by the same legal norms, which means that any development concerning the former will influence the other as well. It is thus pertinent to study intervention by invitation and secessionist conflicts in more detail.

¹³⁷¹ Record of the Security Council's 8144th Meeting, p. 6.

¹³⁷² Visser, 'Russia's Intervention', EJIL: *Talk!*, 25 November 2015; Ruys and Verlinden, 'Digest of State Practice 1 July — 31 December 2014', pp. 141-144; Ruys, Ferro and Verlinden, 'Digest of State Practice 1 July — 31 December 2015', p. 154; Mills, *ISIS/Daesh: the Military Response in Iraq and Syria*, pp. 27-28.

¹³⁷³ Henderson, 'Editorial Comment', pp. 212-213.

3.2. Intervention by Invitation and Secessionist Movements

3.2.1. Applying Armed Intervention to Achieve External Self-Determination

The use of force at the behest of the territorial State is irrevocably linked with internal unrest and conflict, connecting it to severe disruption.¹³⁷⁴ Such disruption could at times be categorised as spurts of the self-determination of peoples, as *inter alia* exemplified by the Prague Spring in Czechoslovakia in 1968.¹³⁷⁵ Sometimes these problems concerning internal self-determination can escalate to a point at which a portion of the territorial State wants to emancipate itself to form a new sovereign State of its own.¹³⁷⁶ This is obviously a controversial proposition from the perspective of international law.¹³⁷⁷ Nonetheless, such secessionist movements have been capturing the world's attention in the past couple of decades, with the examples of Kosovo, Palestine and most recently Crimea being just some amongst the many.¹³⁷⁸ The reactions to such movements have ranged from negative to positive, to the point where the world community is still very polarised on the matter.¹³⁷⁹

While the global opinion on many secessionist movements is experiencing a transformative moment, the traditional legal standard banning third States from getting involved in such aspirations has stood its ground.¹³⁸⁰ In other words, secessionist attempts must occur without foreign armed intervention, either directly or indirectly.¹³⁸¹ This means that third States cannot militarily intervene in the face of potential territorial break-up to support the central government resisting the movement or the actor behind the dissonance.¹³⁸² This is due to the principle of non-intervention: any secessionist

¹³⁷⁴ Gray, *International Law and the Use of Force*, pp. 67-68.

¹³⁷⁵ Tanca, *Foreign Armed Intervention*, pp. 160-161.

¹³⁷⁶ Sterio, *Right to Self-Determination*, p. 19; *Reference re Secession of Quebec*, (1998) 2 SCR 217, paras. 111 and 126-135.

¹³⁷⁷ *Quebec*, paras. 126-135.

¹³⁷⁸ Green, 'Editorial Comment', pp. 6-7.

¹³⁷⁹ Sterio, *Right to Self-Determination*, pp. 13-14; Record of the General Assembly's 64th Session, 120th Plenary Meeting, 9 September 2010, UN Doc. A/64/PV.120, pp. 1 and 3-7, *Request for an Advisory Opinion of the International Court of Justice on Whether the Unilateral Declaration of Independence of Kosovo is in Accordance with International Law*, GA Res. 63/3, 8 October 2008, UN Doc. A/RES/63/3; *Kosovo Advisory Opinion*, para. 1.

¹³⁸⁰ *Friendly Relations*, Principles I, III and V; *Inadmissibility of Intervention*, paras. 1-2; *Rights and Duties*, Articles 3, 9 and 11.

¹³⁸¹ *Friendly Relations*, Principles I, III and V; Antonello Tancredi, 'A Normative "Due Process" in the Creation of States Through Secession', in Marcelo G. Kohen (ed), *Secession: International Law Perspectives* (Cambridge, Cambridge University Press, 2006), pp. 189-190.

¹³⁸² *Friendly Relations*, Principles I, III and V; Tancredi, 'A Normative "Due Process"', pp. 189-190.; Corten, 'Russian Intervention', p. 30; *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, GA Res. 36/103, 9 December 1981, UN Doc. A/RES/36/103, Principle II (f).

movement remains an internal affair of the respective State, denoting that other members of the international community must refrain from intervening in such situations.¹³⁸³

In addition, foreign military support to a group seeking to break away from an existing State would also result in the violation of the prohibition on the use of force.¹³⁸⁴ After all, when laying down the ban on the use of force, Article 2(4) of the Charter specifically mentions the territorial integrity of States, meaning that internationally recognised borders cannot be altered through armed measures.¹³⁸⁵ This statement has been reflected in subsequent Resolutions and documents of various UN organs and other actors, which have stood against recognising territorial changes resulting from the use of force.¹³⁸⁶ In the scholarly world, few would question this legal standing; however, certain States have challenged the notion, as armed interventions in the midst of secessionist movements have taken place.¹³⁸⁷ Some of these interventions have allegedly been pursued with sovereign consent, which may pertain to either the traditional host State or the new aspiring sovereign entity.¹³⁸⁸

However, despite the best efforts of certain States, the relationship between intervention by invitation and secession cannot be achieved easily. The two concepts have tended to be invoked in quite opposing mindsets, which can mean that their simultaneous application may result in direct collisions. Still, given that the idea of applying external self-determination outside the context of decolonisation is rather new, exploring its connection to intervention by invitation is an interesting prospect.

3.2.2. Invited Interventions and Secession: Current Developments Concerning Crimea

No comprehensive study on armed intervention by invitation and secession would be complete without taking a stance on the Ukrainian crisis and the question of Crimea. The crisis first emerged as internal unrest in Ukraine in 2013, but has since escalated into an armed conflict with various international elements, including both direct and indirect use

¹³⁸³ *Friendly Relations*, Principles III and V; *Rights and Duties*, Article 4; *Inadmissibility of Intervention (1981)*, Principle II (f); Corten, 'Russian Intervention', p. 30.

¹³⁸⁴ UN Charter, Article 2(4); Tancredi, 'A Normative "Due Process"', pp. 189-190.

¹³⁸⁵ UN Charter, Article 2(4); *Legal Consequences of the Construction of a Wall*, para. 87.

¹³⁸⁶ *Friendly Relations*, Principle I; *Rights and Duties*, Articles 9 and 11; *Inadmissibility of Intervention*, Preamble and para. 1; Organization for Security and Co-operation in Europe, *Conference on Security and Co-operation in Europe Final Act (Helsinki 1975)*, 1 August 1975, <www.osce.org/helsinki-final-act>, pp. 4-5; *Legal Consequences of the Construction of a Wall*, para. 87.

¹³⁸⁷ Letter dated 19 February 2008 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General; *Territorial Integrity of Ukraine*, Preamble and paras. 1-2 and 5-6; *Kosovo Advisory Opinion*, para. 81.

¹³⁸⁸ Record of the Security Council's 7125th Meeting, pp. 3-4; Green, 'Editorial Comment', pp. 6-7.

of force by foreign actors.¹³⁸⁹ The most prominent of these foreign powers has been Russia, which has participated in the crisis in various ways, with its actions ranging from a fully-fledged armed intervention to providing more subtle support to rebelling factions.¹³⁹⁰

From the perspective of secession and intervention by invitation, the most important of these activities is the Russian armed intervention in Crimea, staged in March 2014. As is now well known, the military intervention was in part based upon the purported consent of the territorial State, Ukraine.¹³⁹¹ The consent was argued to have been extracted from former Ukrainian President Yanukovich, who at the time had fled his homeland to Russia.¹³⁹² In addition, Russia eventually relied on a consent supplied by the then-newly appointed autonomous government of Crimea.¹³⁹³ During this time, the autonomous authorities decided to hold a referendum over the region's secession, with the ultimate intention of joining Russia.¹³⁹⁴ The referendum ended in a landslide in favour of secession, and shortly after the authorities of Crimea and Russia signed an agreement to make the peninsula a part of Russia.¹³⁹⁵ The annexation has not been accepted by the vast majority of the international community, which continues to regard the Crimean region as a part of Ukraine instead.¹³⁹⁶

The Crimean question has many peculiarities. The use of invited intervention in argumentation was not unexpected, but its combination with the right to self-determination was. The two concepts have traditionally tended to work towards noticeably different goals, making the choice curious. For one, intervention by invitation is clearly a concept grounded in the purported sovereignty of the host State and its ability to invite a foreign intervention into its own territory.¹³⁹⁷ Adversely, the right to self-determination in its most extreme form can aim for the territorial breakup of a sovereign

¹³⁸⁹ BBC, 'Ukraine Crisis - Timeline', *BBC News*, 13 November 2014; Green, 'Editorial Comment', pp. 5-7.

¹³⁹⁰ Record of the Security Council's 7125th Meeting, pp. 3-5; *The Territorial Integrity of Ukraine*, Preamble; Council Decision 2014/145/CFSP, p. 16; Council Decision 2014/512/CFSP, p. 13.

¹³⁹¹ Record of the Security Council's 7125th Meeting, pp. 3-4.

¹³⁹² *Ibid.*

¹³⁹³ Record of the Security Council's 7144th Meeting, p. 8-10; Corten, 'Russian Intervention', pp. 31-32 and 39; Green, 'Editorial Comment', p. 7.

¹³⁹⁴ BBC, 'Crimea Referendum: Voters "Back Russia Union"', *BBC News*, 16 March 2014, <www.bbc.com/news/world-europe-26606097>.

¹³⁹⁵ BBC, 'Crimea profile - Overview', *BBC News*, 13 March 2015.

¹³⁹⁶ *Territorial Integrity of Ukraine*, paras. 5-6.

¹³⁹⁷ *Nicaragua*, para. 246; *Definition of Aggression*, Article 3(e); *International Law Commission's Draft Articles on State Responsibility*, Article 20.

State, for the purposes of granting certain peoples the right to secession.¹³⁹⁸ Putting such doctrines together results in an inevitable conflict.

However, Russia's argumentation on Crimea, albeit in many respects staggering, has not appeared completely unexpectedly. Instead, it has been presented after notable developments that have sprawled across numerous decades. This observation naturally refers to intervention by invitation becoming at least partially applicable during internationalised internal conflicts.¹³⁹⁹ Furthermore, the opportunities afforded by external self-determination have been debated extensively during the past few decades, with the question of Kosovo being a notable example.¹⁴⁰⁰ Of course, one has to bear in mind that both ventures are still in development. In other words, the results of their respective evolutions are far from being set in stone, let alone having merged into one, immediately applicable notion.

This tentative finding must be remembered when exploring the connection between intervention by invitation and secession. After all, invited interventions and civil wars are not yet a sealed union, which makes matters complicated for the former's relationship with secession. The same norms govern foreign interventions in both civil wars and secession, but the rules on the use of force are more strict in reference to the latter.¹⁴⁰¹ This is due to the inevitable fact that staging an armed intervention to realise secession would result in reforming accepted international borders through the use of force.¹⁴⁰² Such armed force would threaten the purposes of the UN and Article 2(4) of its Charter.¹⁴⁰³

In any event, one of the most prominent questions raised by the Crimean crisis has been the application of intervention by invitation side by side with secession. Such a proposition is problematic, as the concepts of intervention by invitation and external self-determination do not appear to be well matched. The first alternative, basing an intervention on the consent of the pre-existing host State, directly opposes the need to invoke external self-determination. The other alternative, basing the intervention on the consent of the seceding factor, also ends in stalemate. The core idea of intervention by invitation is based on the consent of a sovereign State — in other words, the doctrine

¹³⁹⁸ Sterio, *Right to Self-Determination*, p. 19-22.

¹³⁹⁹ Akande and Vermeer, 'The Airstrikes against Islamic State in Iraq', *EJIL: Talk!*, 2 February 2015; Van Steenberghe, 'The Alleged Prohibition on Intervening in Civil Wars Is Still Alive', *EJIL: Talk!*, 12 February 2015.

¹⁴⁰⁰ *Inter alia* Record of the General Assembly's 64th Session, 120th Plenary Meeting, pp. 3-7.

¹⁴⁰¹ *Friendly Relations*, Principles I and III; Tancredi, 'A Normative "Due Process"', pp. 189-90.

¹⁴⁰² *Friendly Relations*, Principle I; UN Charter, Article 2(4); *Legal Consequences of the Construction of a Wall*, para. 87; Tancredi, 'A Normative "Due Process"', pp. 189-90.

¹⁴⁰³ *Friendly Relations*, Principle I; UN Charter, Preamble and Articles 1(1) and 2(4).

presupposes Statehood.¹⁴⁰⁴ Thus, militarily supporting a secessionist movement upon request seems legally impossible as well,¹⁴⁰⁵ at least until said secessionist factor manages to attain sovereignty.¹⁴⁰⁶

Due to these issues, the Crimean annexation was met with a predominantly negative response, which means that the case has been rejected as evidence of new international law.¹⁴⁰⁷ However, certain questions remain. While this case failed, could a scenario akin to Crimea's succeed under any circumstances? If so, what would those circumstances entail? To answer these questions, the arguments presented in the Crimean crisis will be dissected in more detail, in an effort to discover if they could become plausible from the perspective of international law.¹⁴⁰⁸

3.2.3. Consensual Use of Force and Secession: of Crimea, Aspiring States and Legitimate Representatives

As noted above, invoking intervention by invitation and secession simultaneously borders on impossible, at least in the purely legal sphere. Still, these concerns did not stop one of the most controversial applications of intervention by invitation, the Russian use of force in Ukraine in 2014. As is now well known, the peninsula of Crimea was claimed by Russia in March 2014, when it announced the region's annexation following its military intervention in Eastern Ukraine.¹⁴⁰⁹ The Russian position on the matter has been striking, and the appearances of intervention by invitation and Crimea's right to secession are no exceptions to this. In fact, the correspondence between the two concepts has been interesting and multi-faceted, as it has raised questions on the norms' limits and co-application.¹⁴¹⁰

The Russian arguments on intervention by invitation can be categorised into two distinguishable parts, the consent of former President Yanukovich, and the request of the Crimean authorities in their autonomous capacity, which we should now examine in respect to the claim of Crimea's secession.¹⁴¹¹ We should first deal with the relatively obvious: the consent issued by former President Yanukovich. The legality of

¹⁴⁰⁴ Green, 'Editorial Comment', p. 7.

¹⁴⁰⁵ Ibid.; Cassese, *Self-Determination of Peoples*, pp. 199-200.

¹⁴⁰⁶ Green, 'Editorial Comment', p. 7.

¹⁴⁰⁷ Ibid., pp. 6-7; *Territorial Integrity of Ukraine*, paras. 1-2 and 5-6; Council Decision 2014/145/CFSP, p. 16.

¹⁴⁰⁸ I have previously discussed this topic in my article concerning the Crimean question, see Tuura, 'Intervention by Invitation and the Principle of Self-Determination in the Crimean Crisis'.

¹⁴⁰⁹ Green, 'Editorial Comment', p. 5.

¹⁴¹⁰ Ibid., p. 7.

¹⁴¹¹ Ibid.; Corten, 'Russian Intervention', pp. 18-20, 31-32 and 39; Record of the Security Council's 7125th Meeting, pp. 3-4; Record of the Security Council's 7144th Meeting, pp. 8-10.

Yanukovych's invitation has been discussed before, and its validity has been established as questionable at best.¹⁴¹² In any event, even if the consent could be seen as legitimate, it is difficult to see how such an invitation could be applied side by side with secession against the host State's will, which is effectively what the Russian intervention resulted in.¹⁴¹³ Combining these two notions appears to create a paradox.

Instead, the tentative Russian argumentation on the validity of the autonomous Crimea's representatives is of particular interest.¹⁴¹⁴ Given that secessionist movements have gained notable support in recent decades, one may wonder if such an entity could validly invite a third State to intervene in order to reach this goal. Of course, in the case of Crimea, such propositions did not meet an excited response.¹⁴¹⁵ And indeed, given the legal limitation that any secession must take place without a foreign armed intervention, this seems to be quite an impossible task.¹⁴¹⁶ Still, international law is flexible and evolutionary by nature, which allows for fast turns. The changing stances towards intervening in civil wars could hence be formulating an additional question: if the principle of non-intervention has arguably been modified to allow such interventions, could an armed intervention to support a secessionist movement be plausible?

The answer is negative. Intervention by invitation is a concept that rests on the premise of a State and its capacity to consent to the use of force in its territory.¹⁴¹⁷ If the actor purporting to ask for a foreign armed intervention is only in the process of gaining sovereignty, the armed measure should not be available to it. Moreover, unilateral intervention in a civil war is still a touchy subject, and therefore far from being a *fait accompli* under all circumstances.¹⁴¹⁸ Given that it shares much doctrinal ground with civil wars, the same will have to apply to secessionist conflicts as well. Thus, militarily supporting a separatist movement will inevitably violate the ban on the use of force and the duty of non-intervention, some of the most important cornerstones of international law.¹⁴¹⁹

¹⁴¹² See Chapter IV, Sections 2.1.2–2.1.4.

¹⁴¹³ *Territorial Integrity of Ukraine*, Preamble.

¹⁴¹⁴ Record of the Security Council's 7125th Meeting, p. 3; Record of the Security Council's 7144th Meeting, pp. 8-10.

¹⁴¹⁵ Record of the Security Council's 7125th Meeting, p. 5.

¹⁴¹⁶ Tancredi, 'A Normative "Due Process"', pp. 189-190.

¹⁴¹⁷ Tanca, *Foreign Armed Intervention*, pp. 13-15; *Nicaragua*, para. 246; *Definition of Aggression*, Article 3(e); Record of the Security Council's 7125th Meeting, p. 5.

¹⁴¹⁸ Van Steenberghe, 'The Alleged Prohibition on Intervening in Civil Wars Is Still Alive', *EJIL: Talk!*, 12 February 2015.

¹⁴¹⁹ *Friendly Relations*, Principles I and III; *Inadmissibility of Intervention*, paras. 1-2; *Rights and Duties*, Articles 4 and 9; *Inadmissibility of Intervention (1981)*, Principle II (f); Tancredi, 'A Normative "Due Process"', pp. 189-190; Corten, 'Russian Intervention', p. 30.

For these reasons, it appears improbable that intervention by invitation as such could be used to enact external self-determination. Of course, given the flexible nature of the Charter,¹⁴²⁰ it is theoretically possible for the rules governing the use of force to evolve to allow foreign interventions in support of secessionist movements.¹⁴²¹ However, if such evolution is to take place, it would be unlikely for the practice not be labelled as intervention by invitation. The concept is too firmly connected to the traditional take on sovereignty, meaning that it would have a difficult time catering to the more modern needs of external self-determination. Thus, use of force working towards such goals ought to be classified as a doctrine of its own, rather than as a part of intervention by invitation.

Still, given the polarised responses that States generally give to secessionist attempts, it is difficult to see how such an evolution could happen. In fact, adding armed force into the already convoluted mix of secessionist attempts is unlikely to occur smoothly.¹⁴²² Furthermore, accepting the use of force to realise territorial changes of any nature is fundamentally against the prohibition entailed in Article 2(4) of the Charter, meaning that the emergence of the aforementioned change would inevitably signify the collapse of the system.¹⁴²³ Indeed, in such a case, little would be left of the prohibition on the use of force altogether. Thus, using foreign armed force to realise secession could threaten the world order, which is why the prohibition on the use of force must supersede secessionist aspirations under these circumstances.¹⁴²⁴

3.2.4. Intervention by Invitation, New-born States and Secession: Possible Future Prospects

The thesis has thus far established that combining traditional intervention by invitation and secession is difficult, as in most cases this would result in inevitable violation of territorial sovereignty. However, additional scenarios are still to be considered when it comes to secession and intervention by invitation. For instance, what occurs in a situation when the secessionist movement has gained notable international support, perhaps causing some members of the international community to consider it a new sovereign entity? Could such an establishment validly invite a foreign intervention, even with the intention of joining that same intervening State? After all, under such circumstances, the

¹⁴²⁰ Franck, *Recourse to Force*, pp. 5-7.

¹⁴²¹ Cassese, *Self-Determination of Peoples*, pp. 199-200.

¹⁴²² Tancredi, 'A Normative "Due Process"', pp. 189-190; Corten, 'Russian Intervention', pp. 30-31 and 39.

¹⁴²³ UN Charter, Articles 1(1) and 2(4); *Friendly Relations*, Principle I; *Legal Consequences of the Construction of a Wall*, para. 87.

¹⁴²⁴ Cassese, *Self-Determination of Peoples*, pp. 199-200.

invitation to intervene would come from the new territorial State, which would most effectively solve the dilemma presented above.¹⁴²⁵

This scenario even has some reflection in practice, as it appears to be one of the tentative claims presented by Russia over the Crimean issue.¹⁴²⁶ In March 2014, Russia ultimately stopped relying on the invitation supplied by Yanukovych, and apparently decided to depend fully upon the consent of the Crimean authorities, presumably in conjunction with developments concerning the region's separation.¹⁴²⁷ In this particular case, the argument found little success, as one of its biggest gripes is the staggering speed with which the secession was executed. Even if the Crimean calls for external self-determination had been found to be valid, the region could not have attained instant sovereignty upon its declaration of independence and referendum. This is so because such actions do not by themselves meet the qualifications of Statehood.¹⁴²⁸ Furthermore, the Russian use of force allegedly began before the Crimean authorities issued the plea for intervention, which further undermines the validity of this claim.¹⁴²⁹

However, this finding does not mean that such an argument could not succeed in other circumstances. In fact, given the concepts of intervention by invitation and secession, this proposition is the most conceivable means of putting the two norms into practice in order to reach a common goal. If a certain distance exists between the formation of the new sovereign State and the invitation to intervene, the scenario does remain plausible, albeit thinly. Of course, whether this situation is probable in practice is a completely different matter. A State absorbing another into itself, in particularly following an armed intervention, is inherently controversial, and thus such activities would not easily gain wide acceptance.¹⁴³⁰ The lack of such support can be crucial for these aspirations. As evidenced by the situations of Southern Rhodesia and Crimea, in the legal sense other States are capable of blocking the birth of a new State or its transition into another.¹⁴³¹

¹⁴²⁵ Corten, 'Russian Intervention', pp. 31-32 and 39.

¹⁴²⁶ Ibid.; Record of the Security Council's 7144th Meeting, pp. 8-10.

¹⁴²⁷ See the Record of the Security Council's 7144th Meeting, p. 8.

¹⁴²⁸ Montevideo Convention on Rights and Duties of States (26 December 1933, in force 26 December 1934) 165 LNTS 19, Article 1; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports (2010), 403, paras. 51, 56 and 82-84.

¹⁴²⁹ BBC, 'Ukraine Crisis - Timeline', *BBC News*, 13 November 2014.

¹⁴³⁰ In its Kosovo Advisory Opinion, the ICJ noted that independence declarations following the use of force or violations of *ius cogens* had often been met with a negative response within the international community, see the Kosovo Advisory Opinion, para. 81; See also *Territorial Integrity of Ukraine*, Preamble and paras. 1-2 and 6.

¹⁴³¹ See *inter alia* *Question of Southern Rhodesia*, GA Res. 2022 (XX), 5 November 1965, A/RES/2022(XX); *Question of Southern Rhodesia*, GA Res. 2024 (XX), 11 November 1965, A/RES/2024(XX); *Territorial Integrity of Ukraine*, paras. 5-6.

Moreover, it does not seem too far-fetched to conclude that negative responses would be given if intervention by invitation was immediately applied to realise secession. The tentative connection between the two already proved well too much in the case of Crimea,¹⁴³² and thus it appears very unlikely that States would support such aspirations in the future. Even Russia, the most prominent advocate on the matter, does not seem keen on this argument, as the State very carefully avoided making infallible connections between the two doctrines in its own claims over the Crimean annexation.¹⁴³³

One can thus contend that any immediate relation between intervention by invitation and external self-determination against the host State's will remains on a level of hypothetical speculation. The practical option of deploying the two concepts simultaneously ranges from highly improbable to borderline impossible, depending on the facts of any given case. The underlying cause for this is the different origins and goals of the doctrines in question. Unilateral secession aims at the construction of a new sovereign entity against the territorial State's will,¹⁴³⁴ whereas consensual use of force has attempted to tether global tensions to a sustainable level.¹⁴³⁵ Furthermore, intervention by invitation, purporting to base itself upon the sovereignty of the territorial State, cannot entertain secessionist aspirations because of their premise. Such aspirations are only intended to establish sovereignty instead of already possessing it, rendering intervention by invitation unavailable.¹⁴³⁶ Such armed interventions could perhaps become plausible following the birth of a new State; however, even in such circumstances, their chances of gaining international acceptance appear unlikely. The attainment of sovereignty and the use of force could be too close for comfort, risking further derogation of the Charter's system.

3.3. Invited Interventions and Internal Conflicts: Final Remarks

While cases of domestic unrest have traditionally contributed to the increased use of intervention by invitation, applying the doctrine in full-scale internal conflicts has been a different matter.¹⁴³⁷ In fact, such a practice was previously considered to be prohibited due to the principle of non-intervention.¹⁴³⁸ Of course, foreign interventions in civil wars

¹⁴³² Record of the Security Council's 7125th Meeting, p. 5; *Territorial Integrity of Ukraine*, paras. 1-2 and 5-6.

¹⁴³³ Record of the Security Council's 7144th Meeting, pp. 8-10.

¹⁴³⁴ *Quebec*, para. 111.

¹⁴³⁵ See Chapter III, Section 1.

¹⁴³⁶ Record of the Security Council's 7125th Meeting, p. 5; Green, 'Editorial Comment', p. 7.

¹⁴³⁷ Marston (ed), 'United Kingdom Materials', p. 616.

¹⁴³⁸ *Friendly Relations*, Principle III; *Rights and Duties*, Articles 3-4; *Inadmissibility of Intervention*, paras. 1-2.

did take place regardless of this prohibition, and this practice has continued since the cessation of the Cold War as well.¹⁴³⁹ The duty of non-intervention initially fended off the challenges these interventions posed to its legal position, but eventually the continuing practice had an effect on the principle.¹⁴⁴⁰ As a result, foreign armed interventions have become more acceptable in certain non-international armed conflicts with international elements: in other words, in civil wars which cannot be classified as purely non-international.¹⁴⁴¹

One should not read too much into the statement presented above, as identifying the international element which can legitimise an external intervention is not simple. To state it differently, not all international elements automatically activate the right of foreign intervention, especially in a military form. As illustrated earlier, matters concerning international terrorism and collective security have been the clearest examples of global elements which may activate the right to resort to an armed intervention, and even they come with their share of issues.

Furthermore, even these two elements have been at play for a relatively small periods. Their effect has thus far been restricted to specific eras, and whether they continue to have an impact in future eras remains to be seen. For example, the fight against international terrorism can be regarded as a state of exception instead of the new normal, meaning that its influence may lack longevity. Of course, this fight has now continued for decades, indicating that in terms of time, the situation appears to have exceeded that of an exception.

The muddling distinctions between internal and international conflicts can also lead to the dissolution of the concept of a non-international armed conflict as we know it.¹⁴⁴² The presence of an international element inevitably suggests that the conflict is not internal in nature, bringing the entire idea of a civil war into question. This can mean that the conflict, which may have started as non-international, may subsequently be transformed in an international one if enough external elements and armed interventions persist.¹⁴⁴³

In any event, the effect of applying invited interventions in civil wars has not fully ascended to the legal realm of secession. Even if the duty of non-intervention has evolved to allow invited interventions in certain internal conflicts, the prohibition on the use of

¹⁴³⁹ Gray, *International Law and the Use of Force*, pp. 86-87 and 113.

¹⁴⁴⁰ *Friendly Relations*, Principle III; *Rights and Duties*, Articles 3-4; *Inadmissibility of Intervention*, paras. 1-2; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', pp. 862-864; Akande and Vermeer, 'The Airstrikes against Islamic State in Iraq', *EJIL: Talk!*, 2 February 2015.

¹⁴⁴¹ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', p. 864.

¹⁴⁴² Neff, *War and the Law of Nations*, pp. 362-363.

¹⁴⁴³ *Ibid.*

force has not yielded to permit such interventions to realise secession.¹⁴⁴⁴ Moreover, intervention by invitation and external self-determination do not work towards identical objectives, making their immediate co-application virtually impossible. It also cannot be stated that the self-determination of peoples would have become pressing enough to validate external military intervention, for such a development would denote discarding the common values embodied in the prohibition to use force. Hence, the Charter's framework for armed force still rules supreme to any perceived right to secession, resulting in military interventions becoming inapplicable.¹⁴⁴⁵

¹⁴⁴⁴ Green, 'Editorial Comment', p. 7.

¹⁴⁴⁵ Cassese, *Self-Determination of Peoples*, pp. 199-200.

4. Changes in Circumstances: Who Will Now Execute Invited Interventions?

4.1. From Cold War Polarisation to Contemporary Issues

In international relations, intervention has always primarily been part of the repertoire of the most powerful States.¹⁴⁴⁶ This premise has applied to military and non-military interventions alike.¹⁴⁴⁷ Intervention by invitation has also reflected this imbalance. Throughout the centuries, it has tended to be a doctrine often exhausted by an exclusive club of States, often with either geopolitical or post-colonialist interests.¹⁴⁴⁸ Admission to said club have generally been granted according to different notions of power, most often of a political and military nature.¹⁴⁴⁹ This was certainly the case during the Cold War, when invited interventions were frequently executed by the superpowers of the time, whereas smaller States were relegated to less prominent roles.¹⁴⁵⁰ However, the latest developments since the end of this polarisation of relations may be pointing in another direction.¹⁴⁵¹ And indeed, the cessation of the Cold War polarisation appeared to suggest that unilateral armed interventions, including consensual use of force by the world's superpowers, had gone out of vogue in conjunction with the era's politics.¹⁴⁵²

As it turned out, smaller States have begun to gain more traction in the field of invited interventions. This has been manifested in Africa, where various interventions have taken place between neighbouring countries.¹⁴⁵³ Furthermore, many of these cases entail full-scale armed interventions, instead of simply consisting of lesser means of military interference such as providing weapons or training.¹⁴⁵⁴ The same issue has appeared in Europe as well, but perhaps in a subtler manner. The focus has been on different forms of regional military cooperation rather than fully-fledged interventions, making the situation markedly different.¹⁴⁵⁵ Nevertheless, some European States, which formerly

¹⁴⁴⁶ *Corfu Channel*, pp. 35-36; Koskenniemi, *Politics of International Law*, pp. 126-127.

¹⁴⁴⁷ *Corfu Channel*, pp. 35-36.

¹⁴⁴⁸ Tanca, *Foreign Armed Intervention*, p. 24; de Wet, 'Modern Practice of Intervention by Invitation', p. 998.

¹⁴⁴⁹ UN Charter, Article 27; Dixon, *Textbook on International Law*, pp. 333-334 and 345.

¹⁴⁵⁰ Tanca, *Foreign Armed Intervention*, p. 24; de Wet, 'Modern Practice of Intervention by Invitation', p. 998.

¹⁴⁵¹ *DRC v. Uganda*, paras. 23-25; Gray, *International Law and the Use of Force*, pp. 69-71.

¹⁴⁵² Tanca, *Foreign Armed Intervention*, pp. 147-148.

¹⁴⁵³ Record of the Security Council's 3987th Meeting, p. 10; de Wet, 'Modern Practice of Intervention by Invitation', p. 981, 986 and 998.

¹⁴⁵⁴ de Wet, 'Modern Practice of Intervention by Invitation', p. 981, 986 and 998; *DRC v. Uganda*, paras. 23-25.

¹⁴⁵⁵ European Council, 'Defence Cooperation: 23 Member States Sign Joint Notification on the Permanent Structured Cooperation (PESCO)', *The General Secretariat of the Council*, 13

stressed a strict duty of non-intervention, have been forced to re-evaluate their stances on the various forms of armed force, intervention by invitation included. A poignant example is the small country of Finland, which has decided to distance itself from its formerly very non-belligerent foreign policy by introducing new legislation on available forms of armed force.¹⁴⁵⁶ The new legislation allows Finland *inter alia* to militarily intervene on request, even urgently under certain circumstances,¹⁴⁵⁷ a measure which was previously unavailable under the country's legislation.¹⁴⁵⁸

But what has led to these changes? The immediate answer appears simple: circumstances. For instance, while various African States were already subjected to invited interventions throughout the Cold War, these operations were often executed by former colonial powers.¹⁴⁵⁹ Since then, these intervenors have expressed restraint over possible foreign armed interventions, which has made the practice of neighbouring States intervening in each other's territory more frequent.¹⁴⁶⁰ Conversely, the European change has been spearheaded by the rise of various terror attacks *inter alia* in Belgium, Denmark, France, Germany, Sweden and the United Kingdom.¹⁴⁶¹

Of course, the on-going change does not necessarily mean that the most powerful States have completely yielded interventions to their smaller counterparts. As is well known, the United States continues to execute invited interventions in various manners, and Russia has also returned to the spotlight with its interventions in Ukraine and Syria.¹⁴⁶² In addition to the two former arch rivals, France has also abandoned its earlier

November 2017, <www.consilium.europa.eu/en/press-releases/2017/11/13/defence-cooperation-23-member-states-sign-joint-notification-on-pesco/>.

¹⁴⁵⁶ *Hallituksen esitys eduskunnalle laiksi kansainvälisen avun antamista ja pyytämistä koskevasta päätöksenteosta* (Act on Decision-making on the Provision and Reception of International Assistance) HE 72/2016 vp. (in Finnish), Article 1(1).

¹⁴⁵⁷ *Laki kansainvälisen avun antamista ja pyytämistä koskevasta päätöksenteosta* (Act on Decision-making on the Provision and Reception of International Assistance) 418/2017 (in Finnish), Articles 4 and 5.

¹⁴⁵⁸ Working Group Drafting Legislation on the Provision and Reception of International Assistance, *Legislation on the provision and reception of international assistance* (Memorandum), Publications of the Ministry for Foreign Affairs 1/2016 (in Finnish), p. 85; Yle, 'Govt pushes ahead with bill to allow overseas military ops', *Yle News*, 12 February 2016, <www.yle.fi/uutiset/osasto/news/govt_pushes_ahead_with_bill_to_allow_overseas_military_ops/8669531>.

¹⁴⁵⁹ de Wet, 'Modern Practice of Intervention by Invitation', p. 998.

¹⁴⁶⁰ Ibid.; Gray, *International Law and the Use of Force*, pp. 69-71.

¹⁴⁶¹ BBC, 'Timeline: Attacks in France', *BBC News*, 26 July 2016, <www.bbc.com/news/world-europe-33288542>; BBC, 'Who was behind the jihadist attacks on Europe and North America', *BBC News*, 30 August 2017, <www.bbc.com/news/world-40000952>.

¹⁴⁶² Record of Security Council's 7125th Meeting, pp. 3-4; Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, 23 September 2014; Letter dated 15 October 2015 from the Permanent

statements which declared interventions by invitation outdated, having intervened upon request in Mali since 2013.¹⁴⁶³ Consequently, the former and current superpowers, few as they may be in today's international community, still continue to be the frontrunners when it comes to intervening militarily upon request.

Nevertheless, the increasing number of smaller States either engaging in or showing interest in invited interventions is undeniable and potentially transformative. Adding such States to the cast of possible intervenors may alter the position of intervention by invitation has in international relations. In fact, the doctrine may currently be shedding its long-lasting image as an elusive superpower tool, as it could instead evolve into a more general practice among States. By doing so, the doctrine could perhaps inch closer to becoming truly global and invoked for common values, rather than being a raw necessity during a power struggle. Thus, examining the current developments in the bill of intervenors is of importance, and said task will be undertaken next.

4.2. Consensual Use of Force and Smaller States as Intervenors: the Effects of a Lopsided Balance

As stated throughout this thesis, intervention by invitation is a manifestation of power politics. This has been the case since the doctrine's inception in the 1800s, and the premise has certainly been upheld during the subsequent centuries. Furthermore, since the conclusion of the Second World War, intervention by invitation has chiefly emerged whenever globalisation, or collective security (to be more precise), has failed.¹⁴⁶⁴ The doctrine has thus painted a rather controversial picture, one which is not easily appreciated by all nations despite the apparent acceptance consensual use of force has enjoyed.

As a result, intervention by invitation has not been a plausible measure for States of smaller stature to exhaust. If anything, such countries have tended to be the targets of invited interventions, which has naturally stained the name of the doctrine amongst them.¹⁴⁶⁵ Moreover, the hard realities behind the use of force have had an inevitable effect: militarily intervening in another State requires vast resources, which many countries simply do not have.¹⁴⁶⁶ Still, this premise does not mean that such countries are complete non-factors when it comes to armed interventions. In fact, as established earlier

Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, Annex.

¹⁴⁶³ *Mali*, SC Res. 2100, Preamble; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', pp. 857 and 863-864.

¹⁴⁶⁴ de Wet, 'Modern Practice of Intervention by Invitation', p. 998.

¹⁴⁶⁵ Tanca, *Foreign Armed Intervention*, pp. 149-151, 158-162, 176-177, 179-180 and 183-184.

¹⁴⁶⁶ *Corfu Channel*, p. 35.

in the thesis, the right to resort to force has traditionally been an integral part of State sovereignty itself.¹⁴⁶⁷ This traditional stance has since been at least partially dissolved by the Charter, but the core connection between the ability to use armed force and sovereign existence still stands.¹⁴⁶⁸ All States must militarily ready themselves for the worst, even during our era of relative peace.

And indeed, this core connection has resurfaced in a manner which has caused smaller States to become more active deployers of force, invited interventions included. This appears to be an outcome of the transformation which started at the end of the Cold War, and has escalated in the past couple of years. The situation is amplified by the unexpected bursts of instability which have rocked our perception of contemporary international relations. For instance, few would have foreseen the forceful Russian annexation of Crimea, the Brexit process currently challenging the European Union or the apparent political meltdown reflected in both internal and external affairs of the United States since the beginning of the Trump presidency.¹⁴⁶⁹ When the continuous rise of international terrorism is added into the mix,¹⁴⁷⁰ one is left with an international community which appears to be undergoing changes, leading it to become slightly off-balance.

At the centre of this lopsided balance has been the relationships between the world's great powers, the United States and Russia in particular. While the exact nature of the current relationship is debatable, it has evidently strayed away from the balance of terror that dictated the course of the Cold War and subsequently invited interventions.¹⁴⁷¹ Moreover, given the diminished number of military operations by the United Kingdom and France, the field in which intervention by invitation has often been applied appears much less crowded, allowing other, smaller States to appear before the spotlight as well.¹⁴⁷² This has led the doctrine towards a transformation. Now ridded of previous world politics, intervention by invitation has been forced to reinvent itself. The reinvention has resulted in an opening that has since been exhausted by smaller States, mostly out of sheer necessity.

¹⁴⁶⁷ Franck, *Recourse to Force*, pp. 1 and 9-11.

¹⁴⁶⁸ *Ibid.*, pp. 1-3.

¹⁴⁶⁹ *Territorial Integrity of Ukraine*, Preamble and paras. 1-2 and 5-6; BBC, 'Brexit: Article 50 has been triggered - what now?', *BBC News*, 29 March 2017, <www.bbc.com/news/uk-politics-39143978>; BBC, 'President Trump: Seven ways the world has changed', *BBC News*, 25 April 2017, <www.bbc.com/news/election-us-2016-37918242>.

¹⁴⁷⁰ *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 2249, Preamble.

¹⁴⁷¹ Tanca, *Foreign Armed Intervention*, p. 24; Fassbender, 'The Security Council: Progress is Possible but Unlikely', p. 56.

¹⁴⁷² Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', pp. 863-864; de Wet, 'Modern Practice of Intervention by Invitation', p. 998.

As it has turned out, the need for invited interventions has not waned in the decades since the Cold War. For instance, multiple countries in Africa have continued to suffer from internal crises which have required resolution through foreign interventions.¹⁴⁷³ Furthermore, as stated earlier, various European States have encountered situations, mostly relating to international terrorism, which have necessitated military help from third countries.¹⁴⁷⁴ In fact, since even the smallest of States cannot presume to be excluded from the threat of international terrorism in the current millennium, they may have no choice but to participate in the fight against it. This scenario has already been realised in practice, and it has led to several smaller States taking part in the military activities against ISIS in Iraq and Syria.¹⁴⁷⁵ These measures have varied from small-scale help to airstrikes,¹⁴⁷⁶ showcasing not only reverent but multi-layered application of the option.

Thus, even though the Cold War intervenors have partially withdrawn from their earlier roles, said parts are still necessary in contemporary international relations. Recasting them has been left to other actors, who are inevitably less famous when it comes to military interventions. This necessity would seem to suggest that intervention by invitation has finally managed to become a commonly exhausted concept rather than being a superpower staple merely tolerated by others. Nonetheless, it is too soon to make a final judgment on the matter. In fact, while these developments may have polished the doctrine's external image, they have not completely ridded it of its core realities, which may hamper the usage of consensual use of force by smaller actors. Hence, the change we are witnessing may be of a noticeably superficial nature, which keeps intervention by invitation from drifting too far from its roots.

4.3. Assembling a New Cast: the Future Billing of Intervenor

With new challenges emerging constantly, intervention by invitation has started to shed the trope of primarily existing to fulfil the needs of the Cold War's great powers.¹⁴⁷⁷ As a result, they have indeed eased their grip on invited interventions, which has meant that smaller, regional States have begun to take a more active role on the matter.¹⁴⁷⁸

¹⁴⁷³ *DRC v. Uganda* paras. 23-25; *Mali*, SC Res. 2100, Preamble; de Wet, 'Modern Practice of Intervention by Invitation', pp. 981, 996 and 998.

¹⁴⁷⁴ Robin Emmott and Sabine Siebold, 'France requests European support in Syria, Iraq and Africa', *Reuters*, 17 November 2015, <www.reuters.com/article/idUSKCN0T611Z20151117>.

¹⁴⁷⁵ Mills, *ISIS/Daesh: the Military Response in Iraq and Syria*, pp. 27-28 and 36-39; Ruys, Ferro and Verlinden, 'Digest of State Practice, 1 January —30 June 2016', pp. 304-305.

¹⁴⁷⁶ Mills, *ISIS/Daesh: the Military Response in Iraq and Syria*, pp. 27-28 and 36-39.

¹⁴⁷⁷ de Wet, 'Modern Practice of Intervention by Invitation', p. 998.

¹⁴⁷⁸ *Ibid.*; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', pp. 863-864.

Nevertheless, the doctrine has still not been fully released for all States to use. The changed circumstances within the international community do not erase the cold realities entailed in interventions of any type: they require military and political prowess, possessed by the select few.

Of course, the evolved application of invited interventions provides more ground for smaller States to participate in such operations. For instance, the muddled distinctions between unilateral and collective military measures may open such options, as matters requiring global attention also often require a wide range of participating States.¹⁴⁷⁹ However, the chance of smaller States undertaking such measures completely unilaterally remain slim, for reasons mentioned above. Politically speaking, such States do not have the same arsenal as their more powerful counterparts. This leaves them more vulnerable to issues ranging from the commencement of the military intervention to its aftermath.

As a result, smaller States are bound to be calculative in military operations, as well as seek assurance from their more powerful partners. This has *inter alia* been the case with the States that have undertaken military activities against ISIS in Iraq and Syria. The cast of intervenors is vastly more versatile in Iraq, the legally easier target of the two, where the deployed measures vary from military training to airstrikes.¹⁴⁸⁰ Conversely, the smaller States using force in Syria are not only fewer in number,¹⁴⁸¹ but also considerably more restrained in terms of activities.¹⁴⁸² Only a handful of States have undertaken airstrikes or provided assistance to factions of the conflict, and they have tended to invoke collective self-defence rather than pure intervention by invitation.¹⁴⁸³

Even more importantly, the military activities on both Iraqi and Syrian soil carry a political safety blanket provided by the participation of the United States,¹⁴⁸⁴ arguably the most powerful State in the world. In addition, Russia's apparent tolerance of the military

¹⁴⁷⁹ *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 2249, para. 5.

¹⁴⁸⁰ Mills, *ISIS/Daesh: the Military Response in Iraq and Syria*, pp. 27 and 36-39.

¹⁴⁸¹ These States also tend to be members of NATO, which provides additional political protection.

¹⁴⁸² Mills, *ISIS/Daesh: the Military Response in Iraq and Syria*, pp. 27-31.

¹⁴⁸³ Letter dated 10 February 2016 from Chargé d'affaires a.i. of the Permanent Representative Mission of the Netherlands to the United Nations addressed to the President of the Security Council, 10 February 2016, UN Doc. S/2016/132; Letter dated 3 June 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council, 3 June 2016, UN Doc. S/2016/513; Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, 9 June 2016, UN Doc. S/2016/523; Ruys, Ferro and Verlinden, 'Digest of State Practice, 1 January —30 June 2016', pp. 304-305; Mills, *ISIS/Daesh: the Military Response in Iraq and Syria*, pp. 27-31.

¹⁴⁸⁴ Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, 23 September 2014.

activities taken against ISIS,¹⁴⁸⁵ alongside its own proactive involvement,¹⁴⁸⁶ is bound to cause the biggest objections on the matter to subside. In other words, the activities of the smaller intervenors, which have arguably been necessitated by distinguishable global threats,¹⁴⁸⁷ still need to be tempered by the presence and policies of more powerful States.

It can hence be concluded that the changed circumstances have not erased the myriad factors which make intervention best suited for bigger countries. One such factor is the reality of State responsibility, which is much more difficult to realise with powerful States. Certain States, particularly the five permanent members of the Security Council, hold a metaphorical royal flush in international relations, which effectively allows them to evade State responsibility to infinity. Smaller states, short of such trump cards, will have to plan their involvement in military operations much more carefully.

Nevertheless, one should not utterly dismiss the emergence of smaller States intervening upon request, even if excessive optimism ought to be discarded. While the impact of smaller States deploying consensual use of force may not be massive, the doctrine's functionality is still evolving. After all, as established on various occasions during this dissertation, intervention by invitation in its post-1945 incarnation is primarily a product of superpower politics. In the wake of its initial renewal, it appeared unlikely that the doctrine could ever evolve past that premise. The fact that the opposite is currently taking place, even in small doses, showcases the ability of the concept to reinvent itself in the face of changes.

Therefore, the increased activity of smaller States reinforces the flexibility and adaptability of the doctrine. This ability of reinvention will play a central role in keeping intervention by invitation afloat, in one form or another. Still, reinvention should not come without determined intention, which is something that intervention by invitation may currently be lacking. After all, for all its instability and polarisation, the Cold War also provided consensual use of force with a definite objective, which kept the doctrine in check. Conversely, the current changes, although undeniably positive in some respects, may be muddling it. In other words, since the doctrine is currently evolving, it is also in limbo. Hence, in order to break this cycle and prevent intervention by invitation from becoming too unpredictable, the concept should find common values to uphold, while still being tethered to the stone-cold realities of the international community.

¹⁴⁸⁵ Mills, *ISIS/Daesh: the Military Response in Iraq and Syria*, p. 65.

¹⁴⁸⁶ Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, Annex.

¹⁴⁸⁷ *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 2249, Preamble and paras. 5.

5. A Reminder from Realism: The Possibility of State Responsibility for Intervention by Invitation

5.1. Preliminary Remarks

The chapter presented discussion about the current tides of intervention by invitation. This has set the focus on the particular modern forms of the doctrine. What is further, the previous sections toyed with the idea of intervention by invitation becoming a champion of common values, which perhaps paints a hopeful picture of the doctrine's future. However, these hopeful images should not turn into blind optimism: the use of force always leaves its marks, which stands true for intervention by invitation as well. By default, no armed intervention can end without irrevocable consequences, both in terms of casualties and material damage.¹⁴⁸⁸ States often do their best to evade any liability in such issues, even when these consequences have been a direct result of their use of force. From the purely legal perspective, this problem can be attended to, as the regime of State responsibility is in place to ensure that States may be held accountable for their wrongful acts.¹⁴⁸⁹

However, true to international law, politics may hamper the proper interpretation and application of the regime, particularly where the use of force is concerned. This behaviour is well exemplified by the aforementioned military intervention in Libya in 2011, which in retrospect can be deemed as severely lacking.¹⁴⁹⁰ The troops executing the intervention arguably acted beyond the mandate to use force, meaning that the aftermath of the intervention was left unplanned.¹⁴⁹¹ As a result, the democratic development in Libya was halted, which allowed new factions to gain momentum.¹⁴⁹² If anything, the intervention has pushed Libya into further chaos, and not least due to the manner in which the intervention was executed.¹⁴⁹³ However, no serious questions about the accountability over the excessive military campaign, and its subsequent effects on Libya, have been raised.¹⁴⁹⁴

¹⁴⁸⁸ UN Charter, Preamble.

¹⁴⁸⁹ See *International Law Commission's Draft Articles on State Responsibility*, Article 1.

¹⁴⁹⁰ Blokker, 'Outsourcing the Use of Force', pp. 204-205; Ku, 'Where Is the International Law Criticism of the Libya Intervention?', *Opinio Juris*, 25 October 2011; Robbins, 'How West's limited intervention failed Libya', *BBC News*, 18 February 2015.

¹⁴⁹¹ Blokker, 'Outsourcing the Use of Force', pp. 204-205; Ku, 'Where Is the International Law Criticism of the Libya Intervention?', *Opinio Juris*, 25 October 2011; Robbins, 'How West's limited intervention failed Libya', *BBC News*, 18 February 2015.

¹⁴⁹² Robbins, 'How West's limited intervention failed Libya', *BBC News*, 18 February 2015.

¹⁴⁹³ *Ibid.*

¹⁴⁹⁴ Blokker, 'Outsourcing the Use of Force', pp. 204-205; Ku, 'Where Is the International Law Criticism of the Libya Intervention?', *Opinio Juris*, 25 October 2011.

Intervention by invitation serves as an interesting example in this respect. The doctrine in its current form is clearly reliant on the regime of State responsibility: the legal reasoning behind this has been explained in Chapters II and III.¹⁴⁹⁵ As established earlier, the host State's consent precludes the wrongfulness of the use of force deployed in its territory.¹⁴⁹⁶ This premise can be linked to State responsibility, in particular Article 20 of the ILC Draft Articles on the matter.¹⁴⁹⁷ While this premise widely removes the State responsibility of the intervenor, certain plausible openings remain. These openings mostly concern the situations in which the intervention has somehow spiralled out of control, reawakening the issue of accountability.

Still, even in these cases, imposing State responsibility is not easy, as a sufficient link between the intervenor and the possible unlawful activities has to be established. Showing this connection becomes pertinent when one has to examine the actions of *de facto* organs of a State, in an effort to discern if they held sufficient control. In fact, in the context of invited interventions, the actions of *de facto* bodies provide the hardest conundrums in reference to State responsibility. After all, given the negative prospects that come with direct military activities, many may prefer intervening via proxy, a move which hinders the chances of State responsibility.

Therefore, the possibility of State responsibility, in particular for the activities of *de facto* organs, is of upmost importance for current intervention by invitation. Whether the intervenor may be held liable for its actions forms a notable factor in the doctrine's practice, since it affects the willingness of States to execute invited interventions. Consequently, this effect is felt in the possibly widening ensemble of intervening States, as well as the forms invited interventions may take. Thus, this chapter ends with a dive into the realm of State responsibility, and its part in the possible aftermath of intervention by invitation.

5.2. Establishing State Responsibility for *De Facto* Organs: The Intervening State's Control over the Military Activities in Past Case Law

As established earlier in the thesis, in the case of a properly issued and followed invitation, the chances of realising the intervening State's responsibility for its military activities are slim.¹⁴⁹⁸ However, if an invited intervention has either crossed the

¹⁴⁹⁵ See Chapter II, Section 3 and Chapter III, Sections 2.3.-2.4.

¹⁴⁹⁶ See Chapter III, Section 2.4.

¹⁴⁹⁷ *International Law Commission's Draft Articles on State Responsibility*, Article 20; The contents of the draft articles are considered to be, at least partially, pieces of customary international law, see *Bosnia and Herzegovina v. Serbia and Montenegro*, paras. 385, 398, 401, 414 and 420.

¹⁴⁹⁸ See Chapter II, Section 3.3.

boundaries of the host State's consent or other limitations imposed by international law, State responsibility for the intervenor becomes possible.¹⁴⁹⁹ Furthermore, genuine consent may not exist to begin with, either due to coercion or an unauthorised representative issuing the invitation, which naturally upholds the problem of accountability over the military intervention.¹⁵⁰⁰ Still, some major hurdles need to be cleared: as with any case of State responsibility, the unlawful military intervention has to be attributable to the intervenor. Since military intervention comes in many forms, the parts of the intervening States may range from the lead role to the stage designer, which can make tracing the responsibility difficult.

Naturally, if the *de jure* actors of the State, such as its official military forces, have taken part in such invited interventions, the accountability of the intervenor is more easily established. This is due to the legal notion that all States bear responsibility for the actions of their officials.¹⁵⁰¹ Actions committed in such capacities are immediately attributable to the State itself, answering the question of responsibility.¹⁵⁰² However, States often intervene upon a purported request indirectly, and settle for delivering military support — in the form of arms, training and financial aid — to the inviting authority.¹⁵⁰³ In such cases, the intervening State does not send its own forces to the territorial State, but does nevertheless affect the military situation.¹⁵⁰⁴ Is the intervening State capable of escaping its responsibility by delegating its tasks to a non-State actor, even if the State *de facto* controls it?

In State practice, these invited interventions have often not been executed accordingly, for the invitation was not supplied by the representative of the host State. Traditionally, this has meant that the intervention was staged to enhance rebel support,¹⁵⁰⁵ but military activities undertaken at the behest of an ousted government can fall under this scope, too. In any event, in such a case, the intervening State may have had deployed military force via delivering support *inter alia* in the form of arms or training, an act which in itself violates various norms of international law.¹⁵⁰⁶ However, does the intervenor bear

¹⁴⁹⁹ *Definition of Aggression*, Article 3(e); Vienna Convention on the Law of Treaties, Articles 53 and 64; UN Charter, Articles 2(4) and 103.

¹⁵⁰⁰ Liebllich, 'Intervention and Consent', p. 341; *Nicaragua*, paras. 207-209 and 246.

¹⁵⁰¹ *International Law Commission's Draft Articles on State Responsibility*, Articles 1-4.

¹⁵⁰² Crawford, *International Law Commission's Articles*, pp. 110-113.

¹⁵⁰³ Jennings and Watts, Oppenheim, p. 435; *Nicaragua*, para. 195; Council Decision 2014/512/CFSP, p. 13.

¹⁵⁰⁴ *Nicaragua*, paras. 241-242.

¹⁵⁰⁵ Such was definitely the case in *Nicaragua*, see paras. 241-242.

¹⁵⁰⁶ For instance, prior to the blatant military intervention that began in 2015, several Western States accused Russia of delivering multileveled support to al-Assad in Syria, which — in the opinion of the former — worsened the crisis, see BBC, 'Syria plane carried radar parts, not

responsibility for the actions committed by the forces it has supported, including possible violations of international humanitarian law or human rights?

The premise of this legal predicament lies with the Draft Articles on State Responsibility. According to Article 8, a State must bear responsibility over the actions committed by individuals or groups acting under its direction or control.¹⁵⁰⁷ This essentially expands the scope of State responsibility from its immediately identifiable organs, and is in place so that States cannot deter liability by outsourcing their activities and duties to non-governmental entities.¹⁵⁰⁸ This means that a *de facto* relationship between a State and an entity can be enough to establish State responsibility under certain circumstances.¹⁵⁰⁹ However, it is unclear if the actions of *de facto* organs and actors are immediately comparable to ones committed by official bodies of the State. Still, the core gist of Article 8 is to ensure that States do not escape their liability due to ‘technicalities’ over the organ acting on their behalf.

In the field of armed force, this Article has proven important due to the growing popularity of private military companies and their execution of armed tasks traditionally undertaken by State militaries.¹⁵¹⁰ Moreover, the rise of State-sponsored terrorism has made the matter infamous as well.¹⁵¹¹ For intervention by invitation, this question holds much weight both in history and the present day: for decades, States willing to intervene upon request have done so covertly, and often at the behest of more or less dubious inviters. Additionally, the intervening States have often carried out indirect military activities that do not immediately involve their own armed forces. Hence, it is vital that the scope of State responsibility expands to forces that are not officially acting for the intervening State but are *de facto* carrying out military operations on its behalf.

However, Article 8 leaves much room for interpretation. It merely mentions the notion of control: it does elaborate on what it entails.¹⁵¹² In other words, what remains debatable is the amount of control required to establish a sufficient link between an entity and the State in question. Fortunately, other actors have been willing to fill this void with their interpretations: however, the outcome of these interpretations is a conflicting one.

weapons — Russia’, *BBC News*, 12 October 2012, <www.bbc.com/news/world-europe-19928139>.

¹⁵⁰⁷ *International Law Commission’s Draft Articles on State Responsibility*, Article 8.

¹⁵⁰⁸ Antonio Cassese, ‘The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’ (2007) 17 *The European Journal of International Law* 645, p. 654.

¹⁵⁰⁹ Crawford, *International Law Commission’s Articles*, p. 110.

¹⁵¹⁰ Katja Nieminen, ‘The Rules of Attribution and the Private Military Contractors at Abu Ghraib: Private Acts or Public Wrongs?’ (2004) 14 *The Finnish Yearbook of International Law* 289, pp. 290-293.

¹⁵¹¹ Cassese, ‘The Nicaragua and Tadic Tests Revisited’, p. 666.

¹⁵¹² Crawford, *International Law Commission’s Articles*, p. 110.

Notably, the issue has been discussed by two UN legal organs, the ICJ and the International Criminal Tribunal for Former Yugoslavia (ICTY). During the merits phases of multiple cases, these courts have formulated two respective lines of interpretation, effective and overall control.¹⁵¹³ The notion of effective control requires strict conditions to establish State responsibility: overall control is more lenient and focuses on case-by-case evaluation. Despite the on-going debate, unanimity on which principle is more suitable from the perspective of Article 8 of the ILC Draft Articles, or customary international in general, is yet to be found.¹⁵¹⁴ Given this confusion, it is first pertinent to examine the three main cases on the matter, and then evaluate how they have been responded to in international and scholarly community.

The case analysis must begin with *Nicaragua*. The facts and outcome of the case have already been cited extensively in this thesis, but the imputability of the intervening State, the United States, is yet to be explored. When examining the legality and responsibility of the United States over its activities in Nicaragua, the Court had to consider how the regime of State responsibility applied in reference to the US support of the Nicaraguan contras. As established earlier in this dissertation, the financial and other support given by the United States was found by the Court to have contravened the principle of non-intervention and the customary ban on force:¹⁵¹⁵ however, it still had to decide if the United States could be held responsible for the violations of international humanitarian law committed by the contras.

In the end, the Court established that State responsibility over the actions of military or paramilitary groups not directly under the control of the State could only be realised strictly: the State must exercise effective control over the group, as well as have control over the military action in question.¹⁵¹⁶ Hence, according to the ICJ, the notion of control comes with two dimensions, one of which addresses the general effective control over the non-State military or paramilitary troops, while the other focuses on the discretion over the specific military operations that may have violated international law.¹⁵¹⁷ Curiously, the Court did not take much time to cite State practice to support its findings on the requirement of effective control: rather, it settled on relying upon the authority of the ILC and its work on State responsibility, while filling some gaps with its own interpretation.¹⁵¹⁸

¹⁵¹³ Ibid., pp. 110-112.

¹⁵¹⁴ *Bosnia and Herzegovina v. Serbia and Montenegro*, paras. 398-400, 402-403 and 406-407.

¹⁵¹⁵ *Nicaragua*, paras. 238 and 242.

¹⁵¹⁶ Ibid., paras. 110 and 115.

¹⁵¹⁷ Ibid.

¹⁵¹⁸ Cassese, 'The Nicaragua and Tadic Tests Revisited', pp. 650-651 and 667-668.

In the case of *Nicaragua*, the Court found that although the United States had indeed violated various norms of international law, its control over the actions of the contra troops was not strong enough to make the State accountable for the specific violations committed by these forces.¹⁵¹⁹ It was held that the connection between the United States and the contra troops was not one of such dependence and control that could make the latter a *de facto* military force of the former.¹⁵²⁰ Moreover, the US had not commanded the specific acts of the contras which allegedly violated international humanitarian law, further weakening the link.¹⁵²¹ Consequently, the United States did not bear State responsibility for the actions of the contras, despite its military support having enhanced the group's capacities to engage in such conduct.¹⁵²² In addition, it was noted by the Court that the contras could have functioned independently even without US support, meaning that they were not a group assembled merely at the behest of the United States.¹⁵²³

The requirement of effective control over the supported groups is a strict one and not easily fulfilled. As stated above, the US involvement with the Nicaraguan contra troops was long-standing, prevalent and clearly in violation with international law. Yet, it was not enough to mark effective control over the troops. Hence, in the Court's mind, general control or direct financial and military aid was not a sign of the contra troops acting on the State's behalf or as its *de facto* organs. Moreover, the condition that the State must have asserted control over the particular military action further complicates the realisation of State responsibility and separates its implications on *de jure* and *de facto* organs of the State. The notion of effective control could also find some support from the commentary to the ILC's Draft Articles, which appears to be quite cautious about the attribution of State responsibility.¹⁵²⁴

Nonetheless, the findings of the ICJ were challenged by the ICTY in the *Tadic* case, in which the interpretation of Article 8 and the notion of control became one of the central issues. While in the initial trial the effective control conditions established in *Nicaragua* had been evaluated and upheld, the appeal to the case led to a different outcome.¹⁵²⁵ In its judgment, the Appeal Chambers took a great amount of time to evaluate the validity of the threshold of effective control, as it felt that this qualification could be too strict from the perspective of international law.¹⁵²⁶ Only in the case of individuals not acting in the

¹⁵¹⁹ *Nicaragua*, para. 116.

¹⁵²⁰ *Ibid.*, paras. 109-110.

¹⁵²¹ *Ibid.*, paras. 115-116.

¹⁵²² *Ibid.*

¹⁵²³ *Ibid.*, paras. 114-116.

¹⁵²⁴ Crawford, International Law Commission's Articles, pp. 112-113.

¹⁵²⁵ *Prosecutor v. Tadic*, Appeals Chamber, 15 July 1999, Case No. IT-94-I-A, paras. 71-74 and 115.

¹⁵²⁶ *Ibid.*, paras. 115-116, 122-124 and 137 and 145.

official capacity of the State could the requirement of high level of control over that person and their actions be a suitable legal condition: in other words, such actors would have to be established as *de facto* actors of the State.¹⁵²⁷ In matters concerning organised and hierarchic groups, particularly military ones, the lower level of overall control should be sufficient.¹⁵²⁸ Moreover, the ICTY adjudged that where military or paramilitary groups are concerned, overall control over the group's specific activities is enough to establish the intervenor's State responsibility.¹⁵²⁹ Finally, the ICTY appeared to stress case-by-case evaluation on many occasions, noting the many differences between various events that could make the formation of perfectly universal standards difficult.¹⁵³⁰

The Appeal Chambers based its conclusion on two aspects. Firstly, it tasked itself with the re-evaluation of the later updated ILC Draft Articles on State Responsibility, and while doing so, decided that requiring effective control over military or paramilitary forces would contradict the purpose of the regime of State responsibility.¹⁵³¹ It particularly stressed Article 10, which imposes imputability on States even for actions of their officials who have acted in contradiction of orders or national legislation, and noted that the condition of effective control could nullify the application of this principle.¹⁵³² In other words, it was noted that States must be held accountable for the actions of the organs they do not fully control: if a threshold as high as effective control is required for *de facto* actors of the States, this principle will be compromised. Although the Appeal Chambers did admit that not all actors for States are strictly comparable, it still maintained that they should be treated equally from the perspective of Article 10, as otherwise States could easily evade responsibility for their actions.¹⁵³³

Secondly, the Appeal Chambers compared the principles established in *Nicaragua* to State practice and case law, and noticed a contradiction.¹⁵³⁴ The Appeal Chambers went on to cite various cases in which the condition of effective control was not applied to military or paramilitary groups supported by third States, and noted that a more relaxed stance on the issue was prevalent amongst many States.¹⁵³⁵ This claim directly supports the first line of argumentation adopted in the case, the contents and proper interpretation of the ILC's Draft Articles on State Responsibility, which are thought to reflect customary

¹⁵²⁷ Ibid., paras. 117-118.

¹⁵²⁸ Ibid., para. 120 and 122.

¹⁵²⁹ Ibid., para. 137.

¹⁵³⁰ Ibid., paras. 117 and 138.

¹⁵³¹ Ibid., paras. 121-122.

¹⁵³² Ibid., paras. 121-123.

¹⁵³³ Ibid., para. 123.

¹⁵³⁴ Ibid., para. 124.

¹⁵³⁵ Ibid., paras. 125-129 and 133.

international law at least partially.¹⁵³⁶ As both State practice and *opinio iuris* are the two components of international custom, the findings on the stances of different States should affect the reading of the Draft Articles and consequently Article 8 as well.¹⁵³⁷

The judgment of the ICTY thus impugns the conclusions of the *Nicaragua* case. Of course, the premises of the *Nicaragua* and *Tadic* cases are not similar, which can quickly be deduced by the legal platforms the cases were adjudged upon: the *Nicaragua* case was a matter between two States, whereas the *Tadic* case first and foremost dealt with individual criminal liability.¹⁵³⁸ Thus, the conclusions the Tribunal made on State responsibility were only conducted because they were necessary in determining matters concerning international humanitarian law.¹⁵³⁹ In other words, the regime of State responsibility was only addressed as a secondary source of legal information.¹⁵⁴⁰ Hence, some have held that the *Tadic* case's implications on the requirements for State responsibility may have to be taken with a grain of salt, best achieved in the form of extensive interpretation.¹⁵⁴¹

And indeed, the ICJ itself rebutted ICTY's claims in 2007, when it adjudged upon the *Bosnian Genocide Case*. Here, the Court had to determine if the Federal Republic of Yugoslavia (FRY) held responsibility over the Srebrenica Genocide, in which the Bosnian Serb troops participated.¹⁵⁴² As the troops were not *de jure* organs of Yugoslavia, the ICJ had to analyse if a sufficient link existed between the State and the armed forces, making them *de facto* bodies of the FRY.¹⁵⁴³ In its judgment, the Court upheld the principle it had established in *Nicaragua*, as it ended up favouring effective control ahead of overall control.¹⁵⁴⁴ As no such amount of control was to be found between the FRY and the armed forces engaged in the genocide, the former could not be held responsible for the massacre in Srebrenica.¹⁵⁴⁵

The Court decided to cast aside the ICTY's findings due to two major factors. The more prominent of them is the argument that the ICTY concentrated on the actions of individuals rather than States, meaning that the judgment's implications on State responsibility could not be immediate ones.¹⁵⁴⁶ The ICJ *inter alia* noted that the Tribunal

¹⁵³⁶ *Bosnia and Herzegovina v. Serbia and Montenegro*, para. 398.

¹⁵³⁷ *Tadic*, paras. 124-125.

¹⁵³⁸ Crawford, International Law Commission's Articles, p. 112.

¹⁵³⁹ *Bosnia and Herzegovina v. Serbia and Montenegro*, paras. 403-404.

¹⁵⁴⁰ *Ibid.*

¹⁵⁴¹ *Ibid.*

¹⁵⁴² *Ibid.*, paras. 64-65.

¹⁵⁴³ Cassese, 'The Nicaragua and Tadic Tests Revisited', p. 650.

¹⁵⁴⁴ *Bosnia and Herzegovina v. Serbia and Montenegro*, paras. 398-400.

¹⁵⁴⁵ *Ibid.*, para. 471.

¹⁵⁴⁶ *Ibid.*, para. 403.

was more focused on discerning if the case concerned internal or international armed conflicts, and that the notions on State responsibility were made in different contexts.¹⁵⁴⁷ Moreover, the Court argued that the Tribunal's argument on overall control would broaden the scope of State responsibility too much.¹⁵⁴⁸ In addition to relying on its own precedents set up in *Nicaragua*, the Court noted that customary international law also supported this stance, as does Article 8 of the ILC Draft Articles.¹⁵⁴⁹ However, as noted in scholarly analysis, the ICJ did not present much State practice and *opinio iuris* on the matter, even though it maintained that certain pieces of the Draft Articles are reflective of customary international law.¹⁵⁵⁰ Such evaluations would have been pertinent to reach proper conclusions on the case.¹⁵⁵¹

Which then holds supreme: effective control or overall control? While the findings of the ICJ have tended to have more immediate authority within the international community and scholars alike, the possibilities of the overall control requirement have not been cast aside. In fact, the ICJ's rebuttal of the overall control condition in the *Genocide Case* has been deemed by some to have been hastily drafted and insufficiently argued.¹⁵⁵² Moreover, it has been noted that the supposed validation of the threshold of effective control can be regarded as a result of feedback loops involving the ICJ and ILC, where the two organs have validated each other's statements without much regard to other sources.¹⁵⁵³

This does not automatically mean that the effective control principle established by the ICJ is invalid: instead, it is submitted that the overall control requirement should not be discarded purely based on the ICJ's case law, in particular since the ICTY took great care to formulate its principle.¹⁵⁵⁴ Indeed, the ICTY's argumentation on the amount of control required to establish State responsibility is, at first glance, solid. In fact, its reflections on the state of customary international law and State responsibility are quite extensive and sophisticated when compared to the notions made by the ICJ in both *Nicaragua* and the *Genocide Case*. However, neither can it be stated that the Tribunal's evaluation of State practice covers the entire subject matter: in fact, only some cases are analysed in

¹⁵⁴⁷ Ibid., paras. 403-404.

¹⁵⁴⁸ Ibid., para. 406.

¹⁵⁴⁹ Ibid., para. 401; Cassese, 'The Nicaragua and Tadic Tests Revisited', p. 651.

¹⁵⁵⁰ Cassese, 'The Nicaragua and Tadic Tests Revisited', pp. 651 and 668; *Bosnia and Herzegovina v. Serbia and Montenegro*, para. 398.

¹⁵⁵¹ Cassese, 'The Nicaragua and Tadic Tests Revisited', pp. 651 and 668.

¹⁵⁵² Ibid., pp. 667-668.

¹⁵⁵³ Ibid.

¹⁵⁵⁴ *Tadic*, paras. 116-145.

judgment, and according to some scholars this case law may have been misinterpreted.¹⁵⁵⁵ It should also be noted that much time has passed since delivery of the *Tadic* judgment: equally much has happened in that time, and these events have affected the regime of State responsibility as well.

5.3. Current Issues Concerning State Responsibility, *De Facto* Organs and Indirect Military Support

As the politics of international relations seldom stay stagnant, neither does the law which is connected to these political tides.¹⁵⁵⁶ Matters concerning armed force have tended to be particularly prone to fast changes: the opinions and practice of States have often taken unprecedented turns, since members of the international community have chosen to adopt drastically different approaches to armed conflicts and incidents in the world.¹⁵⁵⁷ These approaches have not only diametrically opposed the opinions of others, but also the previous stances of the involved States themselves. Examples of such practice on invited interventions were referenced earlier, notably in the section concerning the substantive requirements for the invitation.

This inescapable character of international law means that State responsibility over the actions of non-State military and paramilitary groups must also be projected on the canvas of the current state of affairs. Both principles established in *Nicaragua* and *Tadic* — effective control and overall control, respectively — must therefore be examined in the context of the on-going debates on the matter, which range from combatting international terrorism and the events in Ukraine. Moreover, since the regime of State responsibility is based in customary international law,¹⁵⁵⁸ it is vital that both formulas are compared to modern State practice and *opinio iuris* on the matter.

In the last few years, notable debate concerning the responsibility of States and the use of force has occurred over international terrorism.¹⁵⁵⁹ These debates have prevalently been fuelled by the 9/11 attacks executed by al-Qaida against the United States in 2001.¹⁵⁶⁰ The attacks had an immediate impact on not only the global community but also on international law: in very few days following 9/11, the scope of self-defence was famously broadened by the Security Council, which likened attacks by terrorist groups to

¹⁵⁵⁵ Marko Milanovic, 'State Responsibility for Genocide' (2006) 17 *European Journal of International Law* 553, pp. 585-588.

¹⁵⁵⁶ Ann-Sofie Nilsson, *Political Uses of International Law* (Lund, Lund Political Studies, 1988), pp. 1-2 and 4-5.

¹⁵⁵⁷ *Nicaragua*, paras. 185-186 and 206-208.

¹⁵⁵⁸ *Bosnia and Herzegovina v. Serbia and Montenegro*, paras. 398 and 401.

¹⁵⁵⁹ Gazzini, *Changing Rules*, pp. 184-187.

¹⁵⁶⁰ *Ibid.*, pp. 182-184.

armed attacks.¹⁵⁶¹ This expansion has faced criticism, as observers have feared how the concept of self-defence could play out in its new, modified form.¹⁵⁶²

Nevertheless, this development has led to attributing the actions of international terrorist groups to certain States, even if those groups were not that State's *de jure* organs.¹⁵⁶³ This attribution has been critical as it has allowed countries victimised by terror attacks to enact self-defence against the States to which the terror groups are sufficiently connected.¹⁵⁶⁴ This attribution of State responsibility was famously put into practice by the United States in the Afghanistan War, pursued as a response to the attacks by al-Qaida.¹⁵⁶⁵ Still, it is worth noting that whether the connection was strong enough to legitimise the use of force in this particular case has been debated ever since the commencement of the operation.¹⁵⁶⁶

Attributing responsibility over terrorist attacks to sovereign States has mostly followed the minimum threshold described earlier: the group must at least be a *de facto* organ of the State.¹⁵⁶⁷ However, some States have been willing to go even further by deploying the 'unwilling or unable' doctrine, according to which a State may be held imputable for actions of terrorist groups residing on its territory if it fails to take sufficient action against them.¹⁵⁶⁸ The proponents of this concept have held that such threshold would stop States from evading their responsibility for 'harbouring' or failing to attend to terrorists; the opposers have instead claimed that such qualifications could expand State responsibility too much, and leave openings for unprecedented interventions.¹⁵⁶⁹ While linking States to terrorist groups is a special category of its own, these liberal interpretations could have certain effects on the general notion of *de facto* organs, especially since they so clearly exceed even the overall control principle formulated by the ICTY.

Not surprisingly, the Ukrainian Civil War must be addressed as well. The issues concerning the initial armed intervention in early 2014 were discussed earlier in this

¹⁵⁶¹ *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 1368, Preamble; *Threats to International Peace and Security Caused by Terrorist Attacks*, Preamble.

¹⁵⁶² Cassese, 'Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law', pp. 995-997.

¹⁵⁶³ Gazzini, *Changing Rules*, pp. 186-187.

¹⁵⁶⁴ *Ibid.*, pp. 184-187.

¹⁵⁶⁵ Gray, *International Law and the Use of Force*, p. 203.

¹⁵⁶⁶ Gazzini, *Changing Rules*, pp. 184-185; Dixon and McCorquodale, *Cases and Materials*, p. 544.

¹⁵⁶⁷ Gazzini, *Changing Rules*, p. 186.

¹⁵⁶⁸ Kevin Jon Heller, 'The Absence of Practice Supporting the "Unwilling or Unable" Test', *Opinio Juris*, 17 February 2015, <opiniojuris.org/2015/02/17/unable-unwilling-test-unstoppable-scholarly-imagination>; Corten, 'The "Unwilling or Unable" Test', pp. 778-779.

¹⁵⁶⁹ Heller, 'The Absence of Practice Supporting the "Unwilling or Unable" Test', *Opinio Juris*, 17 February 2015; Corten, 'The "Unwilling or Unable" Test', pp. 792-793.

thesis, but the Russian military presence on Ukrainian soil does not end there. At this point, it is clear that in one way or another, Russia is involved in the subsequent civil war that has been taking place in Eastern Ukraine since the annexation of Crimea in March 2014.¹⁵⁷⁰ According to allegations, the separatists operating against the Ukrainian government have been militarily supported by Russia: this support is claimed to have entailed delivering arms to the separatist groups as well as dispatching Russian troops.¹⁵⁷¹ Russia has denied its military involvement throughout the escalation of the civil war, including its most startling event thus far.¹⁵⁷²

Matters took a dramatic and tragic turn in July 2014, when Malaysia Airlines flight MH17 crashed in the active war zone, at the time controlled by the separatist rebels, in Eastern Ukraine.¹⁵⁷³ In the midst of an array of confusing theories and overwhelming international media scrutiny, it soon became clear that the passenger plane had been shot down, most likely with a surface-to-air missile.¹⁵⁷⁴ This finding was confirmed in October 2015, when the official investigation announced that the airline had been downed by a Russian-manufactured BUK missile.¹⁵⁷⁵ However, neither the matter of who fired the missile nor their exact position was identified in the report concluded on the cause of the crash, leaving the issue unanswered.¹⁵⁷⁶

Accusations over this identity have been tossed back and forth since the tragedy. Ukraine, along with many Western States, has held that the pro-Russian separatists are

¹⁵⁷⁰ Green, 'Editorial Comment', p. 5; Ruys and Verlinden, 'Digest of State Practice 1 July — 31 December 2014', pp. 120-127.

¹⁵⁷¹ BBC, 'Ukraine profile - Overview', *BBC News*, 13 January 2016.

¹⁵⁷² BBC, 'MH17 Malaysia plane crash: What we know', *BBC News*, 28 September 2016, <www.bbc.com/news/world-europe-28357880>.

¹⁵⁷³ Helen Davidson and Alan Yuhas, 'Malaysia Airlines Plane MH17 "Shot Down" in Ukraine - As It Happened', *The Guardian*, 17 July 2014, <www.theguardian.com/world/2014/jul/17/malaysia-airlines-plane-crashes-ukraine-live>; Marko Milanovic, 'The Downing of MH17 and the Potential Involvement of International Courts', *EJIL: Talk!*, 22 July 2014, <www.ejiltalk.org/the-downing-of-mh17-anf-the-potential-involvement-of-international-courts>.

¹⁵⁷⁴ Dutch Safety Board, *Preliminary report: Crash involving Malaysia Airlines Boeing 777-200 flight MH17, Hrabove Ukraine* (the Hague, September 2014), p. 30; BBC, 'MH17 Malaysia plane crash: What we know', *BBC News*, 28 September 2016; Ruys and Verlinden, 'Digest of State Practice 1 July — 31 December 2014', p. 120; *Letter from the Permanent Representative of Ukraine*, SC Res. 2166, 21 July 2014, UN Doc. S/RES/2166, Preamble.

¹⁵⁷⁵ Dutch Safety Board, 'Buk surface-to-air missile system caused MH17 Crash', 13 October 2015, <www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july.2014/publicatie/1658/dutch-safety-board-buk-surface-to-air-missile-system-caused-mh17-crash>; Dutch Safety Board, *Crash of Malaysia Airlines flight MH17, Hrabove, Ukraine, 17 July 2014* (the Hague, October 2015), pp. 253 and 256; BBC, 'MH17 Malaysia plane crash: What we know', *BBC News*, 28 September 2016.

¹⁵⁷⁶ BBC, 'MH17 Malaysia plane crash: What we know', *BBC News*, 28 September 2016; Dutch Safety Board, 'Buk surface-to-air missile system caused MH17 Crash', 13 October 2015.

responsible for downing the plane with a missile they acquired directly from Russia, whereas Russia has maintained that the responsibility lies with Ukraine itself.¹⁵⁷⁷ Within the international community, Ukraine's perspective has gained most proponents at this stage, and various States have called for international judicial processes, including the establishment of a special international tribunal, to solve the case.¹⁵⁷⁸ However, concrete attempts have been rebuked by Russia.¹⁵⁷⁹ Hence, the international response over the liability for the tragedy has been limited to economic sanctions and other measures against Russia.¹⁵⁸⁰

At this stage, any examination of the matter of State responsibility over this particular case must remain at the level of hypothesis. Although the first investigation on the downing of MH17 has been released, it did not conclude who was responsible for firing the BUK missile.¹⁵⁸¹ Still, simply for the sake of argumentation, the possible legal repercussions of the Western claims that the missile was fired by the separatist rebels militarily supported by Russia will be analysed. It cannot be stressed enough that the arguments presented here does not aim to resolve the issue of guilt: as not all the facts are on the table yet, the task is impossible.

It has become more difficult to deny the Russian military involvement in the Ukrainian Civil War. In addition to the obvious military intrusion and annexation of Crimea in early 2014, evidence seems to be mounting on the claim that the rebel separatists are indeed receiving support from Russia: members of Russian armed forces have allegedly taken part in action in the Ukrainian war zone, and the arms deployed by the rebels in combat

¹⁵⁷⁷ Record of the Security Council's 7269th Meeting, 19 September 2014, UN Doc. S/PV.7269, pp. 9, 11-12, 14, 16-17, 19-20 and 23; BBC, 'MH17 Malaysia plane crash: What we know', *BBC News*, 28 September 2016; Olga Ivshina, 'Flight MH17: Russia and its changing story', *BBC Russian Service*, 16 October 2015, <www.bbc.com/news/world-europe-34538142>; Ruys and Verlinden, 'Digest of State Practice 1 July — 31 December 2014', pp. 121-122.

¹⁵⁷⁸ *Letter from the Permanent Representative of Ukraine*, SC Res. 2166, para. 3; BBC, 'MH17 crash: Russia vetoes UN resolution for international tribunal', *BBC News*, 29 July 2015, <www.bbc.com/news/world-europe-33710088>; Jan Martin Lemnitzer, 'International Commissions of Inquiry as a Template for a MH17 Tribunal? A Reply to Larissa van den Herik', *EJIL: Talk!*, 6 March 2017, <www.ejiltalk.org/international-commissions-of-inquiry-as-a-template-for-a-mh17-tribunal-a-reply-to-larissa-van-den-herik/>.

¹⁵⁷⁹ Record of the Security Council's 7498th Meeting, 29 July 2015, UN Doc. S/PV.7498, p. 3; BBC, 'MH17 crash: Russia vetoes UN resolution for international tribunal', *BBC News*, 29 July 2015.

¹⁵⁸⁰ *Inter alia* Council Decision 2014/508/CFSP amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L.226, 30 July 2014, p. 15; Council Decision 2014/658/CFSP amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L.271, 8 September 2014, p. 23; Ruys and Verlinden, 'Digest of State Practice 1 July — 31 December 2014', p. 122.

¹⁵⁸¹ BBC, 'MH17 Malaysia plane crash: What we know', *BBC News*, 28 September 2016.

have been traced back to Russia.¹⁵⁸² In fact, as pointed out by the official investigation and Western media, shortly before the downing of MH17, surface-to-air missiles were reported as being transported from the Russian border, presumably to be used by the rebels.¹⁵⁸³ Indeed, there is an undeniable link between Russia and the separatists; whether this link is strong enough to impose State responsibility on the former is, however, a completely different issue. For State responsibility to be invoked, Russia should have a sufficient amount of control over the rebels.¹⁵⁸⁴ Only in such a case could the separatist group be regarded as a *de facto* organ of Russia, which could establish responsibility. We must hence, yet again, ponder what amount of control suffices, and how the approaches adopted by the ICJ and ICTY would play out in this matter.

If the approach adopted by the ICJ was to be applied, the outcome on Russia's purported State responsibility would come to nothing. Effective control is a high threshold, and if it was not reached in the case of *Nicaragua*, it would be difficult to reach here as well. Furthermore, in order to impose State responsibility, the ICJ demanded not only effective control over the military or paramilitary groups in general, but also over the specific operations that allegedly violated international law.¹⁵⁸⁵ Russia's actions in Ukraine are more than worthy of condemnation, but arguing that the State would knowingly order the rebel forces to shoot down a passenger plane carrying 298 civilians does not seem plausible. If anything, much of the available evidence would seem to suggest that if the rebels shot the plane down, it was due to a series of misunderstandings and sheer incompetence.

Reportedly, the rebels initially thought that the downed plane was performing military duties.¹⁵⁸⁶ however, when operated correctly, a BUK missile system should be able to

¹⁵⁸² Council Decision 2014/512/CFSP, p. 13; Shaun Walker, 'As Russia enters war in Syria, conflict in Ukraine begins to wind down', *The Guardian*, 1 October 2015, <www.theguardian.com/world/2015/oct/01/as-russia-enters-war-in-syria-conflict-in-ukraine-begins-to-wind-down>; Mary Dejevsky, 'Whoever shot down flight MH17, Russia's reputation is in tatters', *The Guardian*, 13 October 2015, <www.theguardian.com/commentisfree/2015/oct/13/shot-down-flight-mh17-russia-malaysia-airlines-ukraine-rebels>.

¹⁵⁸³ Luke Harding and Alec Luhn, 'MH17: Buk missile finding sets Russia and west at loggerheads', *The Guardian*, 28 September 2016, <www.theguardian.com/world/2016/sep/28/flight-mh17-shot-down-by-missile-brought-in-from-russia-ukraine-malaysia-airlines>.

¹⁵⁸⁴ *Nicaragua*, paras. 110 and 115; *Bosnia and Herzegovina v. Serbia and Montenegro*, paras. 399-400 and 406; *Tadic*, paras. 120-123.

¹⁵⁸⁵ *Nicaragua*, paras. 110 and 115.

¹⁵⁸⁶ Yle, 'Separatisti italialaislehdelle: Ammuimme alas malesialaiskoneen', *Yle News*, 23 July 2014, <yle.fi/uutiset/separatisti_italialaislehdelle_ammuimme_alas_malesialaiskoneen/7370682> (in Finnish); Mariano Castillo, 'Alleged phone call: "We have just shot down a plane"', *CNN News*, 18 July 2014, <edition.cnn.com/2014/07/18/world/europe/ukraine-mh17-intercepted-audio>.

identify the type of the aircraft it is aimed at, eliminating such mistakes.¹⁵⁸⁷ It would therefore seem that if the rebels did fire the missile that destroyed MH17, the plane was targeted because the separatists were unable to properly use the missile and hence identify the aircraft as a passenger plane.¹⁵⁸⁸ Although this does not remove the illegality of this purported action, it does suggest that the downing did not follow proper military procedures, which would in turn indicate lack of effective control from Russia, at least in this particular operation.

Despite this conclusion, many actors have more or less clearly hinted at Russian responsibility over the downing of MH17.¹⁵⁸⁹ This should mean that these States, in this case at least, seem to prefer the relaxed qualification of overall control in assessing State responsibility. The notion overall control, which was formulated in the *Tadic* case,¹⁵⁹⁰ could have a better chance to succeed. The separatists in Ukraine could be identified as a military group, meaning that the requirement for effective control need not be fulfilled. Moreover, the condition of sufficient control over the specific military operation, in this case the downing of MH17, need not be fulfilled either, making the possibility of Russian responsibility easier. However, at this stage it is difficult to say if States that are calling Russia responsible genuinely wish to pursue legal routes, or if this is rather a case of political finger-pointing. After all, States are often unwilling to expand legal regimes that could heighten their legal responsibilities. In addition, Russia is by no means the only State that has offered questionable support to factions in countries engulfed by a civil war.¹⁵⁹¹ This puts the States questioning Russia's responsibility in a difficult position, particularly if the military groups they have supported end up committing unlawful acts.

The current issues surrounding State responsibility and *de facto* organs show that even if there has been a growing will to make States accountable for delivering military aid, putting such aspirations into practice remains difficult. States tend to have convoluted and at times conflicting interests in such matters, which means that taking a stern legal position could put them at risk as well. Regularly intervening States appear to be particularly careful in crafting such arguments, as the written word of statements does not always match their actual intention.

¹⁵⁸⁷ Henrik Suni, 'BUK-järjestelmällä osuu matkustajakoneeseen lähes "sataprosenttisella varmuudella"', *Helsingin sanomat*, 18 June 2014, <www.hs.fi/ulkomaat/a1405658289924> (in Finnish).

¹⁵⁸⁸ *Ibid.*

¹⁵⁸⁹ BBC, 'MH17 Malaysia plane crash: What we know', *BBC News*, 28 September 2016; Ivshina, 'Flight MH17: Russia and its changing story', *BBC Russian Service*, 16 October 2015.

¹⁵⁹⁰ *Tadic*, paras. 120-123.

¹⁵⁹¹ Van Steenberghe, 'The Alleged Prohibition on Intervening in Civil Wars Is Still Alive', *EJIL: Talk!*, 12 February 2015.

5.4. Political Considerations on the Effect of Heightened State Responsibility

The idea of intervention by invitation can be a lucrative proposition for an intervening State. If a valid invitation is sought and the intervention is executed accordingly, no accountability for harm should arise. Given its flexibility, intervention by invitation has also turned out to be a politically alluring option, a situation currently best exemplified by the various foreign military interventions in the on-going Syrian Civil War.¹⁵⁹² Most of the world's powerful States are currently engaged in combat in the conflict, to support opposing factions but with a common purported goal: the annihilation of the terrorist group ISIS.¹⁵⁹³

Given this common goal, one might question why collective security was not deployed instead. After all, under the current system intervention by invitation should be inferior to collective measures authorised by the Security Council.¹⁵⁹⁴ This conundrum can be resolved easily, as action under Chapter VII requires political consensus, which currently cannot be reached in the case of Syria.¹⁵⁹⁵ Hence, the intervening States have relied on what they unilaterally regard to be the consent of the valid Syrian representative, which allows each participant to maintain their own political position. However, certain developments since the 2015 Paris attacks may have raised hopes of a unified response to the crisis, even though no official collective military measures have been accepted yet.¹⁵⁹⁶

This political and practical allure of intervention by invitation could easily suffer should the scope of State responsibility become too extensive, especially concerning control over the actions of *de facto* organs. The use of force is always a risky business for States: regardless of the specific nature of the military operations, the outcome is bound to entail unpleasant qualities, casualties included.¹⁵⁹⁷ Consequently, military support short of a full-scale armed intervention is often much preferable. Intervention by invitation, in its flimsiness, has offered a manageable legal basis for States that pursue military activities on another State's soil. Expanding the scope of State responsibility would

¹⁵⁹² Henderson, 'Editorial Comment', pp. 211-214; Visser, 'Russia's Intervention', EJIL: *Talk!*, 25 November 2015.

¹⁵⁹³ Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, Annex; Elise Labott, 'Syria peace talks to resume in two weeks after Friday meeting', *CNN News*, 30 October 2015, <edition.cnn.com/2015/10/29/politics/john-kerry-syria-peace-talks-hell>.

¹⁵⁹⁴ UN Charter, Articles 1(1), 24-25 and 103.

¹⁵⁹⁵ Lister, 'Russia's Syria Expedition: Why Now and What's Next?', *CNN News*, 1 October 2015.

¹⁵⁹⁶ *Threats to International Peace and Security Caused by Terrorist Attacks*, SC Res. 2249, Preamble and paras. 5.

¹⁵⁹⁷ UN Charter, Preamble and Articles 1(1) and 2(4).

therefore contravene the political goals of the intervening States. While many would welcome this as a positive change, the realities of the international community cannot be forgotten: the conduct of States is based on their own motives, and hence any expansion of liability is a difficult proposition to fulfil.¹⁵⁹⁸

Perhaps partially due to these reasons, the ICJ found it better to require effective control over military and paramilitary groups to establish imputability for the intervening State. After all, while it is a heavy statement to decide that a State has violated the sovereignty of another or the principles of non-use of force and non-intervention, it is not nearly as politically condemning as adjudging that State responsible for crimes against humanity, violations of international humanitarian law or breaching human rights.¹⁵⁹⁹ Such would definitely have been the case in *Nicaragua*. Had it been found responsible for the actions of the contras, the United States would have been held imputable for gross violations such as mass rape and other abuse by the armed forces.¹⁶⁰⁰ Establishing US responsibility for the actions would have also implied that the State could have prevented them, and failed to do so. This scenario also applies to the hypothetical responsibility of Russia over the downing of flight MH17: holding the State liable for a mass killing involving hundreds of civilians is a political gamble for other members of the international community, even if the Russian-backed rebels are ultimately determined to have been behind the tragedy.

Of course, liberally interpreted expansions of State responsibility have been circulating in the new millennium; however, one should also bear in mind that these assertions have often concerned international terrorism.¹⁶⁰¹ The global responses to terrorism have tended to be of special nature, and thus one should not be too leisurely in regarding them as having given rise to more general precedents. In fact, the measures taken to fight terrorism have at times appeared to spite the law, which has been reflected in establishing a sufficiently strong link between a terrorist organisation and a sovereign State.¹⁶⁰² Hence, the findings on attributing the actions of terrorist groups to particular States should be viewed through corrective lenses, as applying them literally in other contexts would hardly achieve sustainable results.

Furthermore, even if the scope of State responsibility could be expanded in theory, putting such liability into practice is a completely different matter. Enforcement is a notorious problem in international law, and imposing State responsibility would be no

¹⁵⁹⁸ Cassese, 'The Nicaragua and Tadic Tests Revisited', p. 654.

¹⁵⁹⁹ Ibid., pp. 654-655.

¹⁶⁰⁰ Ibid., p. 655.

¹⁶⁰¹ Gazzini, Changing Rules, pp. 186-187; Heller, 'The Absence of Practice', *Opinio Juris*, 17 February 2015.

¹⁶⁰² Gazzini, Changing Rules, pp. 186-187.

different. And indeed, the existing legal structures offer few bodies effectively capable of holding States accountable for their wrongful conduct. The ICJ is hardly an efficient candidate, as its jurisdiction is voluntary and it lacks enforcement methods all together.¹⁶⁰³ The Security Council would ideally be the most obvious option, but practice will equally obviously explain why such aspirations are hopeless. With the most frequent intervenors as permanent members of the Council, the likelihood of the organ adopting measures against them sits firmly at zero.¹⁶⁰⁴

We have once again arrived at the notion that has made modern intervention by invitation both a necessity and an option: the policies and capacities of the most powerful States in the world.¹⁶⁰⁵ Just as these States — with the help of their influence and position in the global community — were able to allow intervention by invitation to re-emerge during the political impasses of the Cold War, they are also ultimately capable of evading their responsibility due to the lack of effective central enforcement.¹⁶⁰⁶ The structure of the global legal order, or lack thereof, allows for this.¹⁶⁰⁷ The situation could only change if this order was reformed or torn down, options which can be considered unrealistic and undesirable, respectively. Either way, the international community would lose or modify its common ingredients, the global values which hold it together. The loss of these values would inevitably derange intervention by invitation as well, since they have provided the concept with the necessary backdrop and subtext throughout its existence in the UN era.

Still, the most recent practice of intervention by invitation may point towards a slight change regarding State responsibility, albeit not a wholly hopeful one. The focal point of the doctrine has more firmly shifted to interventions that are applied between regional States, many of which do not hold significant power within the global community in the wider sense.¹⁶⁰⁸ In such settings, realising State responsibility over wrongly conducted invited interventions does become more plausible, since smaller States do not wield tools with which they may endlessly evade accountability. Naturally, this is only a partial solution, as smaller States still do not tend to be the frontrunners when it comes to intervening upon request.

Therefore, the core problem created by superpower politics continues to remain dormant, and leaves its imprint on the use of force as a whole. The States which

¹⁶⁰³ The Statute of International Court of Justice, Article 36(1); UN Charter, Article 94(2); Hakapää, *Uusi kansainvälinen oikeus*, pp. 605-606.

¹⁶⁰⁴ UN Charter, Article 27(3); Hakapää, *Uusi kansainvälinen oikeus*, pp. 133-135.

¹⁶⁰⁵ *Corfu Channel*, p. 35; *Nicaragua*, paras. 206-208 and 246.

¹⁶⁰⁶ UN Charter, Article 27(3); Fleur Johns, *Non-Legality in International Law* (Cambridge, Cambridge University Press, 2013), pp. 4-5.; Hsiung, *Anarchy and Order*, pp. 87-89.

¹⁶⁰⁷ Scott, *International Law in World Politics*, pp. 13-15; Amerasinghe, 'International Law and the Concept of Law', p. 79.

¹⁶⁰⁸ de Wet, 'Modern Practice of Intervention by Invitation', pp. 981, 996 and 998.

established these politically tilted limitations remain practically impervious to responsibility, making them much more likely to engage in military activities. This plausible scenario includes intervention by invitation, either directly or by proxy. Moreover, the uneven realisation of accountability between States of different stature may widen the rift between them, hindering the possibility of the use of force truly serving common purposes.

5.5. Final Remarks

State responsibility for internationally wrongful acts is a vital regime of international law, but its practical realisation in cases of intervention by invitation remains difficult. If an invited intervention is executed according to the host State's invitation and other pertinent limitations, the unlawfulness of the use of force by the intervenor is precluded by the consent. Only in cases in which the intervention exceeds the limits of this consent or violates the peremptory norms of international law does responsibility become possible. In such situations, the intervening State may be held accountable for the unlawful use of force: this responsibility is most easily established when the intervenor has staged a direct military intervention with its own troops. If such an intervention either oversteps accepted boundaries, State responsibility for wrongful conduct becomes possible, at least on paper.

Much more pressing problems for State responsibility are the acts committed by the *de facto* groups, when a foreign State decides to support military or paramilitary groups instead of intervening directly. For a State wishing to pursue an invited intervention this is often the preferred course of action, as it not only diminishes the chances of suffering politically damaging losses in the State's own armed forces, but also reduces the likelihood of enforcing State responsibility on them. Still, State responsibility over the actions of militarily supported troops is at least possible, even if such situations are not completely comparable to attribution of acts committed by *de jure* organs.

However, the opinions on what establishes a sufficient connection between a military group and the intervening State are decidedly divided. Both arguments, effective control and overall control, have convincing bases, but also notable shortcomings. The threshold of effective control over both the military group and the specific operation is politically more appealing, but it does not fully conform to the existing customary international law on the matter.¹⁶⁰⁹ The overall control criteria established by the ICTY is more considerate of State practice and case law, but it cannot be regarded as a fully exhaustive answer.¹⁶¹⁰

¹⁶⁰⁹ *Tadic*, paras. 115-116 and 124.

¹⁶¹⁰ Cassese, 'The Nicaragua and Tadic Tests Revisited', pp. 657 and 663.

After all, even the ICTY stressed the need for a higher level of control under certain circumstances.¹⁶¹¹

In any event, regardless of one's take on the matter of control, the difference between 'law in books' and 'law in action' may yet again prove too much. State responsibility over armed interventions concerns very touchy subjects, on which States flippantly tend to change their opinions. This back and forth can reach a point at which they could easily find themselves cornered when their previous statements and actual actions are juxtaposed. Many States could hence be intimidated by establishing too clear a guideline, which means that the confusion over the threshold of control is likely to persist for some time. Moreover, these States include the actors capable of evading the enforcement of international law, leaving only a slim chance of accountability. This rather cynical perspective offers little relief, but it does reflect the position of intervention by invitation as a prominent piece of the most powerful States in the world in their mutual game.

This statement on State responsibility also supports the earlier finding that while consensual use of force has begun to shed its previous role as the necessary evil, it is yet to have a new one cast. The doctrine is no longer a privilege belonging to the most powerful States in the world, while others are relegated the roles of mere spectators. However, the limitations imposed by pure realism have not been erased either, which has left the transformation of consensual use of force incomplete. The concept is therefore attempting to reformulate itself so that it can cater to the needs of the international community. This has caused it to adapt many forms in the past few decades, ranging from countering international terrorism to serving an illegal annexation of territory. What is debatable, then, is whether the concept will be able to attend to the global community as a whole, or if its opportunities will only be seized by the select few.

¹⁶¹¹ Ibid., p. 657; *Tadic*, paras. 118-119.

Chapter VI

Final Remarks — How to Perceive Intervention by Invitation

1. Decoding the Core Nature of Contemporary Armed Intervention by Invitation

Intervention by invitation is a misleading concept in many respects. From the practical point of view, it appears to be simple at first sight: the territorial State consents to an armed intervention, which leads to a third State executing said intervention accordingly. However, this simplicity is a mere decoy which distracts us from the various difficulties the doctrine entails, particularly in the international legal landscape following the end of the Second World War. Under today's international law, intervention by invitation finds itself locking horns with the regulation on the use of force, as it is not included in the UN Charter as such.¹⁶¹² Furthermore, the doctrine's application, while not diametrically opposed to it, can also stretch the limits of the duty of non-intervention, particularly in non-international armed conflicts.¹⁶¹³

Despite this premise, intervention by invitation has been embraced by various States over the course of decades, which has led to all the major UN organs accepting the concept.¹⁶¹⁴ However, said practice has not come without its share of controversy, which has brought the applicability of the scope of intervention by invitation into question.¹⁶¹⁵ As a result, State practice has confirmed that while few would deny the legal admissibility of the doctrine, its exact limits and other practical aspects remain debated.¹⁶¹⁶ This creates an ambivalence, one which has persisted throughout the UN era and caused the doctrine to appear contradictory in many aspects, for its hazy parameters can be spun in various ways.

The juxtaposition should come as no surprise, since — as noted very early in this dissertation — even as a term intervention by invitation contains an inevitable oxymoron. Intervention is often understood as meddling in a matter against the subject's will,

¹⁶¹² UN Charter, Article 2(4); de Wet, 'Modern Practice of Intervention by Invitation', p. 980; Cassese, *International Law*, pp. 369-370.

¹⁶¹³ Jennings and Watts, *Oppenheim*, p. 435; de Wet, 'Modern Practice of Intervention by Invitation', pp. 992-998.

¹⁶¹⁴ *Nicaragua*, para. 246; *DRC v. Uganda*, paras. 42-54; *Definition of Aggression*, Article 3(e), *Mali*, SC Res. 2100, Preamble.

¹⁶¹⁵ Fox, 'Intervention by Invitation', pp. 816-817, 829-831 and 834-838; de Wet, 'Modern Practice of Intervention by Invitation', pp. 980-981; Mullerson, 'Intervention by Invitation', p. 132.

¹⁶¹⁶ Crawford, *Brownlie's Principles*, pp. 769-770.

whereas an invitation entails a plea to take part in something. No matter how one spins it, combining these two words results in a conflict. Thus, it is logical that the paradox has not been limited to the terminological sphere either, as the conundrums caused by the doctrine's application in practice are merely a reflection of its conceptual dilemma.

Given the paradox that intervention by invitation carries at its core, parsing these issues can seem overwhelming. This adds another, apparently paradoxical layer to intervention by invitation. Surely, given its prominent use, States would much prefer the concept to be detailed in a clear manner? Nonetheless, the haziness is not without reason. In fact, such evasiveness is a key ingredient in the success of intervention by invitation. All this is for the goals and purposes of sovereign States, which tend to bend international norms to fit their agenda. Intervention by invitation is no stranger to this: in fact, it is a doctrine which follows this dilemma by design.¹⁶¹⁷ The flexibility of intervention by invitation makes it so alluring for States to exhaust, and thus defining the doctrine too robustly would hinder its application.

Consequently, one must accept that when it comes to intervention by invitation, ambivalence is an integral part of the legal concept itself. Very notably, this is prominently manifested in the doctrine's re-emergence following the adoption of the Charter in 1945. When the centralisation of the use of force unravelled fast, intervention by invitation managed to reclaim support from the most powerful members of the international community, which deployed the doctrine to further their own policies.¹⁶¹⁸ This superpower advocacy was later echoed by support from other States and UN organs, albeit not in a very straight-forward manner.¹⁶¹⁹ Furthermore, intervention by invitation has managed to reinvent itself continuously throughout its existence; however, these reinventions have come about in an effort to accommodate new contexts, not the original intent of the Charter.

The concept therefore both reappeared and thrived due the regulation on the use of force having failed, necessitating the return of this notion rooted in traditional law. This falls well short of ideal law-making, even when judged by the standards of international law. In fact, it could be stated that intervention by invitation resurged to serve international politics rather than law, meaning that by default it appears to champion the individual interests of powerful States. One might thus say that intervention by invitation bore a rather villainous role, especially when contrasted with the goals of the Charter.

¹⁶¹⁷ *Nicaragua*, paras. 206-208 and 246.

¹⁶¹⁸ Mullerson, 'Intervention by Invitation', pp. 127-129; Tanca, *Foreign Armed Intervention*, p. 24.

¹⁶¹⁹ *Definition of Aggression*, Article 3(e); *Nicaragua*, para. 246; *DRC v. Uganda*, paras. 42-54; *Mali*, SC Res. 2100, Preamble.

Despite this rather cynical finding, intervention by invitation had a purpose even during the decades of the Cold War: containing the political polarisation within the international community.¹⁶²⁰ Although this theme is once again more immediately based in politics than law, it has provided intervention by invitation with a general goal to serve. Furthermore, during these decades of political polarisation, the objective of intervention by invitation came with two distinguishable, yet apparently opposed layers. On one hand, the doctrine was unmistakably invoked to cater to the politically powerful, a situation made necessary by their global power struggle. Yet, on the other hand, intervention by invitation kept this struggle tethered to a manageable level, thus preventing the global polarisation from turning into a full-scale war. The ambivalent concept was thus a necessary evil, a thoroughly unpleasant doctrine invoked to prevent catastrophes on a larger scale.

Hence, the undeniably hostile nature of intervention by invitation has been laced with an underlying purpose in the past, which further deepens the oxymoronic concept. Moreover, the lack of such a purpose in contemporary international law may cause the concept to go into a tailspin, when it frantically attempts to find a new course for itself. After all, international law is not the sturdiest legal discipline of the lot, which constantly leaves it subject to the whims of the politically mighty. This unavoidable fact will be reflected on intervention by invitation as well. Without a common goal, either explicit or implicit, the concept will be vulnerable to the changes initiated by the agendas of the politically powerful. While it is impossible to predict the effects of these future changes in an exact manner, certain more general observations can be made on how the doctrine is bound to pan out.

¹⁶²⁰ See Chapter III, Section 1.

2. Piecing Together an Impossible Puzzle: What Is Modern Intervention by Invitation?

2.1. Discarding the Part of the Necessary Evil

In the first chapter, a metaphor which likened intervention by invitation to a jigsaw puzzle that is impossible to complete for a variety of reasons was introduced.¹⁶²¹ The puzzle has too many pieces, some of which appear to be missing, and these pieces seem unwilling to form a coherent picture despite multiple attempts. This conundrum exists because the puzzle's pieces originate from several legal sources, including but not limited to State sovereignty, the use of force, the duty of non-intervention and the regime of State responsibility. The jigsaw puzzle in question cannot form an original picture to begin with, but rather it can end in a distorted collage of others. Hence, given the sheer complexity of the task, a person attempting to solve the puzzle will likely feel tempted to arrange the available pieces into an imitation of a solution and call it a day.

However, remaining satisfied with this inevitably misconstrues intervention by invitation as a legal doctrine. After all, despite its outward appearance, the concept has carried not only a theme but also a subtext since its reinvigoration during the Cold War: maintaining yet containing the political *status quo* of the international community, the balance of terror between the superpowers. Therefore, the concept could have been characterised as the necessary evil, the apparent antagonist that was needed to not only hold the story together, but to allow the plot to advance as well. And indeed, we have now moved to a new era. However, due to this setting, the cessation of the Cold War also marked a possible beginning of troubles for intervention by invitation. The changes meant that the doctrine no longer worked to uphold the superpower balance, and thus it has been forced to seek an alternative goal to serve.

This has been the case ever since. While the change in political pace was welcomed by many who had become weary by the seemingly endless decades of political polarisation, it also meant that intervention by invitation lost its backdrop, which it has been unable to recover. Having been rid of its objective, the doctrine has been in free fall, which further distorts its appearance. This is particularly troubling given the current, unpredictable developments to which the international community has been subjected. While no one knows what the future has in store, as of late, the global community has had to endure heavy turbulence at the courtesy of particular members, a development which may profoundly impact the world community as we currently know it.¹⁶²²

¹⁶²¹ See Chapter I, Section 1.2.

¹⁶²² BBC, 'President Trump: Seven ways the world has changed', *BBC News*, 25 April 2017.

Given its flexibility, intervention by invitation is bound to make appearances in these contexts; in fact, it has already done just that.¹⁶²³ The concept positively thrives where dysfunction reigns, ensuring its durability against even the most challenging changes. However, although it has been featured in some of the most notable armed interventions of the past couple of decades, consensual use of force does not appear to be following a particular theme. On the contrary, the doctrine appears undeniably ambivalent, having been invoked for a variety of reasons and political goals.

When combined with potentially disastrous circumstances, said flimsiness can result in the realisation of actual catastrophes. For instance, what if intervention by invitation is added into a fast escalating mix, perhaps even an inter-State war? Or what about a wartime situation that could include the use of nuclear weapons? Even less explosive contexts are difficult enough when it comes to managing intervention by invitation, meaning that these threats could reveal an even more vicious side of the doctrine. This hazard could perhaps be reined in by discovering a shared value which intervention by invitation could emulate. However, forging such a value may prove difficult due to the politically charged international community.

Naturally, this is by no means a new issue for intervention by invitation to contemplate: its practice during the Cold War took place in the midst of a constant fear of an escalated conflict between the powerful.¹⁶²⁴ Still, for quite a few decades now, the international community has been spared from taking such a threat too seriously. This has allowed concepts such as invited intervention to adopt new roles, ones which may more explicitly serve global values and collaborate with collective uses of force.¹⁶²⁵ However, matters relating to a global tensions and possible conflicts may no longer solely reside in post-apocalyptic literature. Thus, norms regulating international relations appear to be destined for a rough ride, which does not bode well with a concept as tender as intervention by invitation. Hastily packaged legal doctrines, excel as they might during turbulence, are not bound to offer solid solutions to unforeseen dilemmas.

Of course, intervention by invitation is not alone in such a situation, since legal norms of any kind, especially those encoded in international law, must always accept the possibility of unforeseeable circumstances.¹⁶²⁶ For instance, since even the use of nuclear weapons cannot conclusively be ruled out from the scope of admissible armed force, the

¹⁶²³ Record of the Security Council's 7125th Meeting, pp. 3-4 and 6-7; Record of the Security Council's 7144th Meeting, pp. 8-10; Ruys and Verlinden, 'Digest of State Practice 1 July — 31 December 2014', pp. 140-143.

¹⁶²⁴ Lawrence Hargrove, 'Intervention by Invitation', pp. 115 and 119.

¹⁶²⁵ Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes', pp. 867-868.

¹⁶²⁶ Koskeniemi, *Politics of International Law*, pp. 206-207.

unthinkable remains ever present in international relations.¹⁶²⁷ This reality conditions the limits of law, since in law-making it is borderline impossible to determine all the situations in which the regulation in question becomes applicable.¹⁶²⁸ This causes all legal norms, even those accordingly legislated with clear goals in mind, to come with a touch of haziness on the side, as no rule can be completely definite.¹⁶²⁹

Thus, intervention by invitation is ultimately going through the same struggle as all concepts of international law. In other words, the doctrine suffers from the irrevocable condition of being an international norm, which means that its haziness is not about to be settled any time soon. Such a scenario would only arise if international law as an entity began to function in a more wholesome manner, a situation which is unlikely to present itself, especially given the currently testy state of international relations.¹⁶³⁰ As a result, intervention by invitation will continue to serve as the likely caterer to the different needs of the interventionist States, albeit not in a manner immediately comparable to the times of the Cold War. This simultaneously underlines the concept's dual position as a wild card, a role it has played for some decades now, and also as a partial enhancement of superpower politics.

2.2. Reining in Intervention by Invitation: What Is Its Point?

While the most modern form of intervention by invitation has partially remained a superpower staple, it has also begun to serve global goals more explicitly, yet still limitedly. Although this can be considered to be positive, in particular from the perspective of the international community at large, the concept has also become unpredictable as a result. This means that the doctrine is privy to modifications, perhaps those of an even unexpected and sudden nature.

But how can this situation be prevented from becoming an abomination? The answer, quite predictably, lies with the theme discussed in this dissertation throughout: further emphasising the values which the international community as a whole holds in high regard. Of particular importance would be the adoption of common objectives, which then rein in the use of invited interventions. This would bring forth some much needed balance between sovereign and common interests, allowing consensual use of force to become a more functional legal concept.

Of course, as noted above, this evolution has already occurred in certain contexts. However, thus far its effects have been left on more superficial levels, since the specific supranational goals have appeared to coincide with individual objectives. The military

¹⁶²⁷ Ibid.; *Nuclear Weapons*, paras. 96-97.

¹⁶²⁸ Koskenniemi, *Politics of International Law*, pp. 206-207.

¹⁶²⁹ Ibid.

¹⁶³⁰ Legvold, 'Managing the New Cold War'.

actions staged to contain the threat of ISIS around the globe illustrate such ambivalence. While tentative cooperation exists, the matter of ISIS is attended to case-by-case in accordance with sovereign interests, rather than with a clearly-cut plan pursuant of uniformly agreed upon objectives.¹⁶³¹

And indeed, the promotion of common purposes should currently be a priority. Reining in the application of invited interventions is vital, for even in recent years, the concept has showed its ugly side in practice. This was the case when the doctrine was invoked by Russia in its arguments on the Crimean crisis.¹⁶³² While this piece of legal argumentation was widely debunked, it can unfortunately encourage further appearances of invited interventions under even more controversial circumstances. Moreover, these circumstances can stretch the doctrine's limits even further, perhaps to the point where its already sketchy legal requirements are utterly discarded in favour of political interests.

While the current developments concerning intervention by invitation have thus far strayed from becoming a full-scale catastrophe, they have not inspired confidence in the doctrine becoming a sturdier legal concept. Moreover, modern intervention by invitation suffers from a certain deficit, one which was not present during the Cold War. While the polarisation of relations and the threat of full-scale conflict was palpable during that time, the Cold War still bore a tentative, often hidden rationale amidst all its anomalies. The superpowers engaged in the continuing crisis, the United States and the Soviet Union, both agreed to avoid the escalation of matters, and instead sought to use indirect means.¹⁶³³

Intervention by invitation served this understanding — sometimes perhaps too effectively.¹⁶³⁴ The concept allowed the powerful States to engage with each other in a manner which, while keeping the crisis afloat, stopped the situation from reaching an unwanted apex.¹⁶³⁵ In other words, while invited interventions often supported superpower politics, they also helped to contain the delicate balance of terror. In contrast, the issues presently engulfing the international community lack such an underlying understanding, making the precise prediction of further developments a job best prescribed for a prophet.

Thus, foreseeing the exact future of intervention by invitation falls outside the toolkit of this dissertation. The following, however, is perfectly clear. Intervention by invitation

¹⁶³¹ This can be seen in the very different responses to the interventions in Iraq and Syria in 2014, see Henderson, 'Editorial Comment', pp. 210-212.

¹⁶³² Record of the Security Council's 7125th Meeting, pp. 3-4; Record of the Security Council's 7144th Meeting, pp. 8-10.

¹⁶³³ Gray, *International Law and the Use of Force*, p. 84.

¹⁶³⁴ Hargrove, 'Intervention by Invitation', pp. 115-119; Wedgwood, 'Commentary on Intervention by Invitation', p. 137.

¹⁶³⁵ Gray, *International Law and the Use of Force*, pp. 84 and 110.

was reborn out of both sheer necessity and well-disguised common interests during the Cold War era. Consensual use of force is therefore, by its very nature, capable of addressing even the extreme needs of the society of States. Consequently, should the doctrine ultimately fail in acknowledging a new, commonly agreed agenda to serve, it would be due to the international community facing unprecedented difficulties. Such a situation is yet to present itself.

For now, the impossible jigsaw puzzle known as intervention by invitation remains in a shambles, as post-Cold War developments have failed to clarify the concept. With no definite purpose in sight, forming a coherent picture out of the pieces of the doctrine has not become any easier. Thus, the current lines of the doctrine must be threaded while remembering the obvious wisdom on the use of force: any form of unilateral armed intervention ought to be exercised with caution.¹⁶³⁶ Unfortunately, both history and present have shown that such caution cannot be taken for granted. The international community has proven its tendency of faltering over important matters, the non-use of force included. What is further, intervention by invitation has had the habit of appearing during such blunders, often with undesirable results.

However, optimism should be retained even during the worst of times, particularly when they are very different from the biggest atrocities faced by humankind.¹⁶³⁷ What is further, for all the trouble it has caused, throughout history, intervention by invitation has also managed to leave stabilising effects in its wake, an achievement it remains perfectly capable of. Furthermore, the mere fact that intervention by invitation managed to both re-emerge and later persevere showcases the concept's contingency, even if it is hidden underneath political clutter. It can therefore be safely assumed that intervention by invitation will survive the current turbulence, in one form or another.

One can only hope that this survival will come with a refined sense of purpose. Of course, forming such an objective is not wholly — or at all — dependent on intervention by invitation itself. Rather, the process relies on the international community, as well as its various actors. Modern intervention by invitation in any form is merely the outcome of the policies and decisions these participants make, a stance which is not very reassuring given the persistent dysfunction present in international law. Nonetheless, even when matters seem dire, it can still be assumed that the members of the global community are not dead set on wreaking havoc, as even an imitation of harmony should be a preferable option. This premise will continue to be reflected on intervention by invitation, building it a common framework, albeit perhaps a fragile one. Nonetheless, such a framing, no

¹⁶³⁶ UN Charter, Preamble and Article 1(1); Franck, *Recourse to Force*, pp. 1-3.

¹⁶³⁷ UN Charter, Preamble.

matter how delicate, will give the doctrine much needed perimeters within which it can function into the foreseeable future.

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